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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 725.

THE UNITED STATES OF AMERICA EX RELATIONE WILLIAM F. CREARY, PLAINTIFF IN ERROR,

vs.

JOHN W. WEEKS, SECRETARY OF WAR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 30, 1922.

(28,680)

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1 Supreme Court of the District of Columbia.

At Law.

No. 64936.

THE UNITED STATES OF AMERICA ex Relatione WILLIAM F. CREARY, Petitioner,

vs.

NEWTON D. BAKER, Secretary of War, Respondent.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Petition for Writ of Mandamus.

Filed January 3, 1921.

In the Supreme Court of the District of Columbia.

At Law.

No. 64936.

THE UNITED STATES OF AMERICA ex Relatione WILLIAM F. CREARY, Petitioner,

vs.

NEWTON D. BAKER, Secretary of War, Respondent.

To the said Supreme Court of the District of Columbia:

Your petitioner and relator, William F. Creary, respectfully represents:

1. That he is a citizen of the United States and a resident of the District of Columbia, and files this petition in his own right against the defendant, Newton D. Baker, who is Secretary of War, and as such an officer of the Government of the United States and temporarily resident in the District of Columbia.

2. Petitioner represents that he was born in the District of Columbia the 27th day of April, 1870; that he enlisted in the Regular Army of the United States on the 19th day of January, 1893, and served as private, corporal, and sergeant, Company C, 3rd Infantry,

from the date of his enlistment to the 23rd day of March, 1896; that after and as the result of a competitive examination he was duly nominated, confirmed by the Senate, appointed, and commissioned, from the ranks of the Army, second lieutenant, Infantry, the 5th day of March, 1896, and accepted said commission the 24th
2 day of March, 1896; thereafter and in due course of lineal promotion in accordance with the law governing promotion in the Army as it existed up to June 4, 1920, he was, after due examination and a finding of moral, professional, and physical qualification, nominated, confirmed, appointed, and commissioned first lieutenant, 12th Infantry, the 12th day of August, 1898; that after a like examination and finding of moral, professional, and physical fitness, he was nominated, confirmed, appointed, and commissioned captain, 30th Infantry, the 9th day of April, 1901; that after a like examination and finding of moral, professional, and physical qualification, he was nominated, confirmed, appointed, and commissioned major the 1st day of July, 1916; that he was nominated, confirmed, appointed, and commissioned lieutenant colonel (in the temporarily increased regular establishment) the 5th day of August, 1917, and that he was likewise commissioned colonel in the temporarily increased regular establishment on the same day, and that by a system of selection and not by promotion he was appointed and commissioned colonel in the National Army on the same day; that thereafter, after the armistice and after due examination and finding of moral, professional, and physical qualification, he was nominated, confirmed, appointed, and commissioned lieutenant colonel, 5th Infantry in the Regular Army, the 27th day of December, 1919, and that he was duly appointed and commissioned by promotion colonel in the Regular Army July 20, 1920, to rank from July 1, 1920, and that he served in such status until the 23rd day of November, 1920, when he received the following order:

War Department,
Washington, November 17, 1920.

Special Orders No. 271-O. PEM 423. Confidential.

Extract.

69. Colonel William F. Creary, Infantry, having been finally classified in Class B, for causes due to his neglect, misconduct, and avoidable habits, his discharge from the Army, by direction of the President, under the provisions of section 24*b*, of the act of Congress approved June 4, 1920, is announced.

By order of the Secretary of War:

PEYTON C. MARCH,
Major General, Chief of Staff.

Official:

P. C. HARRIS,
The Adjutant General.

For official use only, not to be made public.

3 since which time he has been deprived of the office of colonel in the Regular Army of the United States and the pay, allowances, and emoluments of said office. Petitioner respectfully represents that as an enlisted man and an officer in the United States Army for a period of service of twenty-eight years including arduous service in active campaign in all the wars in which this country has been engaged during that time, he has always rendered efficient service and has never been guilty of any neglect of duty, misconduct, or disqualifying habits.

3. Petitioner avers that in the month of June, 1920, he was informed by the War Department that a classification board convened by virtue of the authority of section 24*b* of the act of Congress of June 4, 1920, commonly called the Army reorganization act, had provisionally arranged him in class B as unfit to be retained in the service. Upon such notification petitioner, by virtue of the authority of said section of said act, requested a court of inquiry and accordingly a court of inquiry was convened by the President at the headquarters of the Sixth Corps Area, at Chicago, Illinois, September 21, 1920, to consider the sole question whether or not petitioner should be continued in class B, petitioner appearing before said court of inquiry without counsel. The court of inquiry concluded the inquiry on the day it was convened, after a brief hearing of two and one-half hours, and on the 10th day of October, 1920, a copy of the record of the proceedings was furnished petitioner which showed that the court of inquiry was of the opinion that petitioner should be continued in class B.

4. Petitioner avers that in the court of inquiry, he was not furnished with a full copy of the official records upon which the proposed classification was based, as the statute mandatorily requires. The record of the proceedings of the original classification board shows that that board reported that it had examined "into the record of Colonel William F. Creary, Inf., and upon consideration of his record as a whole from the date of his first commission in the Army of the Unted States to the present date, finds that he should not be retained in the service." Full copy of the petitioner's record as a whole from the date of his first commission in the Army of the United States to the present date (that is the date of the proceedings of the provisional classification board) was not furnished petitioner, but that upon the other hand petitioner was furnished copies of brief extracts from his record containing only all the unfavorable portions of his record and omitting all favorable portions. He avers, therefore, that the court of inquiry proceeded in flagrant violation of the plain mandate of the statute enacted for the benefit of the officer undergoing inquiry in order that he might be fully informed of the basis of the imputation against him and be prepared to
4 meet it. Petitioner is advised and believes, and so avers, that such violation of the mandate of the statute rendered the proceeding of the court of inquiry and all subsequent proceedings based thereon null and void. Petitioner is further informed and believes, and so avers, that the respondent has never caused the

record of the proceedings of said court of inquiry to be transmitted for his review to the Judge Advocate General of the Army and that consequently the said record of said court of inquiry has never been received and reviewed by the Judge Advocate General of the Army, as the statute requires, by reason whereof neither the final classification board, nor the President, nor the board of officers convened to determine the cause of classification, has been advised of the illegal character of the proceedings of said court of injury; and petitioner is further informed and believes, and so avers, that the respondent has never transmitted, or caused to be transmitted, to the President of the United States said record of said court of inquiry for his consideration, review, and action, and that consequently the President has never considered, reviewed, and acted upon said record of proceedings as the law requires.

5. Petitioner avers that after receiving the copy of the proceedings of the court of inquiry, he heard nothing whatever concerning his case until he received the order of discharge hereinbefore set out. He had no notice of the convening of a final classification board, nor of any proceeding, action, or finding by such board; he had no notice of the submission to the President of the finding of such a board, no opportunity to petition the President for a revision of the action of said board, and no notice of any proceeding or action taken by the President thereon, nor of the convening of a board of officers to determine whether the classification thus finally made by the final classification board was due to petitioner's neglect, misconduct, or avoidable habits, nor of any proceeding, action, or finding by such a board of officers; nor had he any notice of the submission to the President of the finding of such a board, or of any proceeding or action taken thereon, nor opportunity to petition the President for a revision of the action of said board of officers.

6. Petitioner avers that he has no personal knowledge that a final classification board and a board of officers, as provided by statute, were ever convened in, or ever gave any consideration to, his case, and he further avers that through his atorneys, by letter dated December 8, 1920, copy of which is annexed hereto and made a part hereof, he requested the War Department to furnish him with a copy of the proceedings had in his case before the final classification board and before the board of officers that determined that his classification was due to his neglect, miscounduct, and avoidable habits, and that to such request the War Department has made no reply and with it the said department has not complied. In view of the said communication hereinbefore set out purporting to discharge petitioner from his office in the Regular Army, petitioner believes, and so avers, that by order of the respondent a final classification board was convened and did consider his case, and that likewise a board of officers was convened and did consider the cause of petitioner's classification, and that said final classification board, acting pursuant to the orders of said respondent, held and decided that petitioner should be eliminated from active service in the Army, and that said board of officers, likewise so acting, held

and determined that petitioner should be absolutely discharged from his office in the Army, and that accordingly and as the result of such action the respondent issued the order hereinbefore set out purporting to discharge petitioner from the Army of the United States.

7. Petitioner avers that the proceedings of the final classification board and the proceedings of the said board of officers acting under and pursuant to the orders of said respondent were private, secret, precipitate, and unlawful and without notice to the petitioner and without affording him an opportunity to be heard, and that by reason whereof said proceedings and all subsequent acts and proceedings based thereon are null and void.

8. Petitioner is informed and believes, and he so avers, that one or more of the members of the provisional classification board were disqualified from sitting on said board and from a fair performance of their duty, by reason of the fact that they had made unfavorable reports which were considered by the provisional classification board as a part of the basis of its adverse classification; and petitioner is further informed and believes, and so avers, that one or more members of the final classification board were likewise disqualified from sitting on said board and from a fair performance of their duty by reason of the fact that they had also made unfavorable reports upon petitioner considered by them in determining the final classification of petitioner; and petitioner is further informed and believes, and so avers, that one or more members of the board of officers convened to determine the cause of the classification were disqualified from sitting on said board and from a fair performance of their duties by reason of the fact that they had previously sat as members of a board, administratively convened, that passed adversely upon the efficiency of petitioner. By reason whereof the proceedings of the said provisional classification board, of said final classification board, and of the said board of officers are null and void, and all subsequent proceedings based upon them of no effect.

9. Petitioner is informed and believes, and so avers, that respondent has never transmitted, or caused to be transmitted, to the
6 President for his consideration, review, and action, as the law requires, the record of the proceedings of the said court of inquiry, the record of the proceedings of said final classification board, and the record of the proceedings of said board of officers convened to determine the cause of classification, and that consequently the President has never considered, reviewed, and acted upon any of said proceedings.

10. Petitioner is advised and believes, and so avers, that by reason of the unlawful acts as hereinbefore stated, petitioner has been unlawfully discharged by respondent from the Army of the United States and by him deprived of his office of colonel therein and of the pay, allowances, and emoluments incident to said office, in violation of the statute and without due process of law.

Wherefore, inasmuch as the said respondent has, in his attempt to discharge petitioner from the Army as aforesaid, acted beyond his power and jurisdiction in the premises and has done petitioner irreparable harm and injury, and inasmuch as the law provides no other remedy in the premises whereby your petitioner can have relief, your petitioner prays:

(1) That a writ of mandamus may be issued and directed to the said Newton D. Baker, Secretary of War, commanding him to vacate and set aside the said order of discharge, dated the 17th day of November, 1920, purporting to discharge your petitioner from the Army, and to restore your petitioner to his office of colonel in the Army of the United States.

(2) For such other and further relief as the court may deem proper and the nature of the case may require.

And your petition will ever pray.

WILLIAM F. CREARY,
Petitioner.

RUSSELL & BAILEY,
Counsel for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the foregoing petition by me subscribed, and know the contents thereof; and that the statements of fact therein made as upon personal knowledge are true, and those made as upon information and belief I believe to be true.

WILLIAM F. CREARY.

Subscribed and sworn to before me this 30 day of December, 1920.

[SEAL.] T. C. MEIDINGER,
Notary Public, D. C.

7 *Rule to Show Cause.*

Filed January 3, 1921.

* * * * * * *

Upon consideration of the petition filed herein by the United States of America ex relatione William F. Creary, it is by the court this 3d day of January, 1921, ordered that the said respondent, Newton D. Baker, Secretary of War, be, and he is hereby, commanded and ordered to show cause on the 21st day of January, 1921, why the writ of mandamus should not issue out of this court commanding him to vacate and set aside the said order, dated the 17th day of November, 1920, purporting to discharge the relator, William F. Creary, from the Army of the United States and to restore said relator, William F. Creary, to his office of colonel in the Army of the United States, as prayed in the relator's petition herein: Provided, That a

copy of this order be served upon the said respondent on or before the 5th day of January, 1921.

By the Court:

WALTER I. McCOY,
Chief Justice.

Answer of Defendant, Newton D. Baker, Secretary of War, to Petition for Mandamus and to Rule to Show Cause.

Filed January 25, 1921.

* * * * * * *

Newton D. Baker, Secretary of War, now and at all times saving and reserving unto himself all exceptions to the imperfections, uncertainties, and defects in the petition for writ of mandamus filed herein, and reserving unto himself the benefit of the lack of jurisdiction of the court, appearing on the face of said petition, to grant the relief prayed for, and the lack of jurisdiction of the court to direct him, as Secretary of War, to perform the act in question, and relying on the same, as if demurrer had been specifically interposed, for answer to said petition or so much thereof as is material, and to said rule to show cause, says:

1. Defendant admits the allegations of the first paragraph of the petition.

2. Defendant admits the allegations of the second paragraph of the petition except the allegations of the last two lines thereof, which he denies.

3. Defendant admits the allegations of the third paragraph of the petition except the allegation that the court of inquiry therein referred to was convened to consider the sole question whether
8 or not plaintiff should be continued in class B, as to which defendant avers that said court of inquiry considered all questions required by the statute to be considered by said court, including the question whether or not plaintiff should be continued in class B.

4. Defendant denies the allegations of the first sentence of the fourth paragraph of the petition and with respect to that and the second sentence thereof, defendant avers that plaintiff was, in the court of inquiry therein referred to, furnished with a full copy of all unfavorable reports, notations, or papers considered by either the original or final classification board in his case; that the same were the only records upon which his classification in class B was based or proposed to be based and that such course of procedure is, as defendant believes and therefore avers, in all respects as required by statute; and defendant further avers that in said court of inquiry plaintiff was given full opportunity to examine the entire record of his service as an officer of the Army from the date of his first commission therein to the date of the session of said court,

Defendant admits that the record of the proceedings of the court of inquiry in plaintiff's case was not transmitted to the Judge Advocate General of the Army or reviewed by him. With respect to the closing allegations of said paragraph appearing at the top of page five of the petition, defendant alleges that the record of the court of inquiry was considered together with the record of the final classification board and acted upon in the manner more particularly set forth in paragraph 9 hereof. With respect to the other allegations of said paragraph, defendant is advised by counsel that the same are matters of law or argument which are not well pleaded and that he is not required to answer the same; and he therefore refrains therefrom.

5. Defendant admits the allegations of the fifth paragraph of the petition except the allegation that plaintiff had no opportunity to petition the President for a revision of the action of the final classification board or of the board to determine the cause of his classification, as to which he avers that he has taken no action preventing or hindering plaintiff from petitioning the President for an order in revision of the proceedings of either of said boards. Defendant further avers that plaintiff never requested notice of any of the actions or proceedings mentioned in said paragraph or opportunity to petition the President as therein suggested.

6. In answer to the allegations of the sixth paragraph of the petition, defendant admits that no notice was given plaintiff of the meeting of the final classification board or of the board of officers to determine the cause of plaintiff's classification, and he admits that the letter of plaintiff's attorneys of December 8, 1920, was sent as therein alleged and received at the War Department, and he
9 avers that the Adjutant General by defendant's order did on the 18th day of December, 1920, answer the letter of plaintiff's counsel and did thereby inform plaintiff that a copy of the proceedings of the final classification board in his case would not be furnished him, but that he or his counsel might examine the record of such proceedings and that thereafter plaintiff's counsel did call at the War Department and examine the record of such proceedings. With respect to the allegations of the last sentence of said paragraph, defendants refers to paragraph ten of this answer, wherein his answer to the same is fully set forth.

7. In answer to the allegations of the seventh paragraph of the petition, defendant admits that the proceedings of the final classification board and of the board to determine the cause of classification were private, that no notice was given him of the convening of either, or of the personnel of said boards, or of the time when his case would be considered by either, but he denies that no opportunity was afforded plaintiff to be heard before either of said boards and avers that plaintiff was heard before those boards in that a complete record of the proceedings of the court of inquiry before which plaintiff was heard, containing a copy of the testimony, statements, and evidence by plaintiff and in his behalf, was submitted to and considered by each of said boards. With respect to the other allegations

of said paragraph, defendant is advised by counsel that the same are matters of law or argument which are not well pleaded and that he is not required to answer the same; and he therefore refrains therefrom.

8. In answer to the allegations of the first sentence of the eighth paragraph of plaintiff's petition, defendant avers that one member of the preliminary classification board had previously in the course of his duty made an adverse report upon plaintiff's efficiency and that previously in the course of his duty one member of the final classification board had made a like report and that previously in the course of his duty one member of the board to determine the cause of plaintiff's classification had sat as a member of a board administratively convened, which had classified plaintiff as a "misfit" for the duties he was then performing, but defendant denies that said officers or any of them were biased or disqualified from sitting on the several boards of which they were members, or from a fair performance of their duty as such. With respect to the allegations of the second sentence of said paragraph, defendant is advised by counsel that the same are matters of law or argument which are not well pleaded and that he is not required to answer the same; and he therefore refrains therefrom.

9. With reference to the allegations of the fourth and ninth paragraphs of plaintiff's petition concerning the alleged failure of this defendant to transmit or cause to be transmitted to the President the records of the proceedings of the court of inquiry and of
10 the final classification board and of the board to determine the cause of plaintiff's classification and concerning the alleged lack of consideration, review, or action of or upon the same by the President, defendant avers that prior to any determination or classification in plaintiff's case he laid before the President the whole matter of the procedure to be followed and the action to be taken in all cases of classification and determination under the provisions of section 24B, and received from the President then and there a general authority and direction that he, as Secretary of War, should in all such cases take such action in the name of the President and by his authority by way of approval, revision, or otherwise as from the circumstances shown by the record in each such case appeared to him to be right and proper, and that pursuant to such authority and direction so received by him from the President he, as Secretary of War, and W. R. Williams, Assistant Secretary of War, took the following action, which was in all respects in accordance with such directions of the President:

(1) The signing by this defendant, on behalf and by authority of the President, at the foot of the record of the final classification board, but prior to the submission of such record to the board to determine the cause of plaintiff's classification, of the following notation:

"Approved:
"BAKER,
"*Secretary of War.*"

(2) The signing by this defendant, on behalf and by authority of the President, at the foot of the record of the board to determine the cause of plaintiff's classification of the following notation:

"Majority report approved.
"BAKER,
"Secretary of War."

(3) The reading by this defendant in person of the records of the preliminary classification board, the court of inquiry, the final classification board, and the board to determine the cause of classification in plaintiff's case, and the signing by W. R. Williams, Assistant Secretary of War, pursuant to instructions to that effect given him by this defendant after such reading, and on behalf of and by authority of the President, on November 17, 1920, subsequent to the action of the board to determine the cause of plaintiff's classification, of an instrument of approval, a copy of which is annexed to this answer and marked "Exhibit 1," which is prayed to be taken as a part hereof.

(4) The issuance on November 17, 1920, by order of this defendant, on behalf and by authority of the President, of a special
11 order discharging the plaintiff from the United States Army, of which a true copy, marked "Exhibit 2," is attached hereto and prayed to be taken as a part hereof.

With respect to the other allegations of the ninth paragraph of the petition, defendant is advised by counsel that the same are matters of law or argument which are not well pleaded and that he is not required to answer the same; and he therefore refrains therefrom.

10. In answer to the allegations of the tenth paragraph of the petition, so far as they are allegations of fact, defendant avers that in accordance with section 24B of the act of June 3, 1916, as amended June 4, 1920 (41 Stat., 759, 773), immediately upon the passage of the act of June 4, 1920, the President convened a board of not less than five general officers, as more fully set out in paragraph 7 of this answer, and shown by Exhibits 3 and 4, attached hereto, which are true copies, respectively, of the order convening said board and an order amendatory thereof, and which are prayed to be taken as a part hereof; that said board has been since its appointment, and is now, engaged in arranging all officers of the Army in two classes, namely, class A, consisting of officers who should be retained in the service, and class B, of officers who should not be retained in the service, and that said board, in accordance with said statute, provisionally arranged plaintiff in class B, and that plaintiff thereupon requested that a court of inquiry be convened before which he might be given an opportunity to appear, and that accordingly a court of inquiry was convened, before which plaintiff appeared in person, but stated he did not desire counsel; that in such court plaintiff was furnished with a full copy of the official records upon which his proposed classification was based, as has been more fully set out in paragraph 4 of this answer, and was given by and before said board full and

free opportunity to present testimony of himself and others in his behalf and to be heard fully, of which opportunities he availed himself so far as he desired; and that the record of such court of inquiry was forwarded to the final classification board for reconsideration of plaintiff's case, and after such consideration the final classification board placed plaintiff in class B, which action was approved as more particularly set forth in paragraph 9 of this answer, and that the President has not ordered further revision of said finding of said classification board, and that after plaintiff was placed in class B, as aforesaid, a board of three officers was convened to determine whether such classification was due to his neglect, misconduct, or avoidable habits, as shown by Exhibits 5 and 6 attached hereto, which are true copies, respectively, of the order convening said board and an
12 order amendatory thereof, and which are prayed to be taken as a part hereof, and that the finding of a majority of said board was affirmative and of a minority of said board negative, and thereafter this defendant, acting on behalf and by authority of the President, approved said majority report, and that thereafter on November 17, 1920, by the order attached hereto as Exhibit 2, plaintiff was discharged from the Army in accordance with the statute hereinbefore cited and in all respects as provided by law.

Wherefore, having fully answered the allegations of plaintiff's petition, so far as he is advised by counsel it is necessary for him to answer, and having shown cause why the writ of mandamus should not issue against him as prayed in said petition, this defendant prays that he may hence be dismissed with his reasonable costs in this behalf sustained.

NEWTON D. BAKER,
Secretary of War.

JOHN E. LASKEY,
Attorney for the United States in and for the District of Columbia.
L. H. VANDOREN,
Assistant Attorney for the United States in and for the District of Columbia.
FREDERICK M. BROWN,
Judge Advocate, U. S. Army,
Of Counsel for the Defendant.
W. A. GRAHAM,
Judge Advocate, U. S. Army,
Of Counsel for the Defendant.
ARCHIBALD KING,
Judge Advocate, U. S. Army,
Of Counsel for the Defendant.

DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the foregoing answer by me subscribed, and know the contents thereof; and that the statements of facts therein made as upon personal knowledge are true, and those made as upon information and belief I believe to be true.

NEWTON D. BAKER.

Subscribed and sworn to before me this 25th day of January, 1921.
[SEAL.] JNO. B. RANDOLPH,
Notary Public, District of Columbia.

EXHIBIT 1.

In reply refer to A. G. 201—Creary, William F., Col. Inf.

War Department,
Washington, November 17, 1920.

The action of the classification board in finally classifying Colonel William F. Creary, Infantry, in class B is approved by the
13 President, and, by his direction a board of officers having determined that such classification is due to the officer's neglect, misconduct, and avoidable habits, Colonel Creary, is discharged from the service under the provisions of section 24*b*, of the act of Congress approved June 4, 1920.

(Signed) W. R. WILLIAMS,
Assistant Secretary of War.

EXHIBIT 2.

War Department,
Washington, November 17, 1920

Special Orders No. 271-O.
Confidential.

Extract.

69. Colonel William F. Creary, Infantry, having been finally classified in Class B for causes due to his neglect, misconduct, and avoidable habits, his discharge from the Army, by direction of the President, under the provisions of section 24*b* of the act of Congress approved June 4, 1920, is announced.

By order of the Secretary of War:

PEYTON C. MARCH,
Major General, Chief of Staff.

Official:
P. C. HARRIS,
The Adjutant General.

EXHIBIT 3.

War Department,
Washington, D. C., June 12, 1920.

Special Orders No. 138-O.
Confidential.

Extract.

Par. 1. Paragraph 9, Special Orders 137-O (confidential), War Department, June 11, 1920, is amended to read as follows:

"Paragraph 33, Special Orders 134-O (confidential), War Department, June 8, 1920, is amended to read as follows:

"By direction of the President, a board of officers to consist of:
"Lieutenant General Robert L. Bullard, United States Army,
"Major General John F. Morrison, United States Army,
"Major General John Biddle, United States Army,
"Major General George W. Read, United States Army,
"Major General Charles P. Summerall, United States Army,
"Brigadier General Charles J. Bailey, United States Army,

is appointed to meet in this city at 10.00 a. m., June 14, 1920, or as soon thereafter as practicable, at the call of the senior member thereof, and at such times thereafter as the senior member shall prescribe, for the purpose of making the classification of officers under the provisions of section 24*b*, chapter 1, act of Congress, approved June 4, 1920.

14

"The board will call on the classification and data section, personnel branch, Operations Division, General Staff, for such data as may be necessary for its deliberations.

"Major William H. Dodds, junior, General Staff, is detailed as recorder of the board, without vote.

"Such journeys as may be required of members of the board for the purpose indicated are necessary in the military service."

[A. G. 334, 4 Classification Bd.]

By order of the Secretary of War:

W. M. WRIGHT,
Major General, Acting Chief of Staff.

Official:
P. C. HARRIS,
The Adjutant General.

EXHIBIT 4.

War Department,
Washington, October 19, 1920.

Special Orders No. 246-O.
Confidential.

Extract.

Par. 45. By direction of the President, Major General John L. Hines, United States Army, is detailed as a member of the board of officers appointed in paragraph 1, Special Orders No. 138-O, June 12, 1920, War Department, vice Major General Robert L. Bullard, United States Army, hereby relieved.

[A. G. 334, Officers' Classification Board.]

By order of the Secretary of War:

PEYTON C. MARCH,
Major General, Chief of Staff.

Official:
P. C. HARRIS,
The Adjutant General.

15 EXHIBIT 5.

Case No. —.

Proceedings of a board of officers convened pursuant to the following order:

War Department,
Washington, D. C., July 15, 1920.

Special Orders No. 165-O.
Confidential.

Extract.

By direction of the President, a board of officers to consist of

Brigadier General Andre W. Brewster, U. S. Army,
Colonel Grote Hutcheson, Cavalry,
Colonel Deane C. Howard, Medical Corps,

is appointed to meet in this city at 10.00 a. m. July 19, 1920, or as soon thereafter as practicable, at the call of the senior member thereof, and at such times thereafter as the senior member shall prescribe, for the purpose of determining whether or not officers were placed in class B due to their own neglect, misconduct, or avoidable habits, under the provision of section 24-*b*, act of Congress, approved June 4, 1920.

Captain Frederick D. Griffith, junior, General Staff, is detailed as recorder of the board, without vote.

Such journeys as may be performed by members of the board in attending the meetings of the board and in returning to their proper stations upon the conclusion thereof are necessary in the military service.

By order of the Secretary of War:

PEYTON C. MARCH,
Major General, Chief of Staff.

Official:
P. C. HARRIS,
The Adjutant General.

EXHIBIT 6.

War Department,
Washington, September 7, 1920.

Special Orders No. 210-O.
Confidential.

Extract.

72. The detail, by direction of the President, of Major Donald H. Connolly, General Staff, as recorder of the board of officers appointed by paragraph 39, Special Orders 165-O (confidential), July

15. 1920, War Department, for the purpose of determining whether or not officers were placed in class B due to their own neglect, misconduct, or avoidable habits, under the provisions of section
16 24-B, act of Congress, approved June 4, 1920, vice Major Frederick D. Griffith, jr., General Staff, as of September 3, 1920, is announced.

The travel directed is necessary in the military service.

By order of the Secretary of War:

PEYTON C. MARCH,
Major General, Chief of Staff.

Official:
P. C. HARRIS,
The Adjutant General.

Demurrer.

Filed January 31, 1921.

* * * * * * *

Comes now the relator, by his attorneys, and demurs to the answer of the respondent in the above entitled case and says that the same is bad in substance.

ANSELL & BAILEY,
T. T. ANSBERRY,
Attorneys for Relator.

Note.

Among the points of law to be argued in support of the foregoing demurrer are the following:

1. That the petition herein and the answer thereto show that the respondent, in discharging the relator from the Army of the United States, did so in plain disregard and violation of the statute and transcended his power and jurisdiction in so doing.

2. That it appears by the petition and the answer thereto that the relator was not furnished with a full copy of the official records upon which the proposed classification was based, as the statute mandatorily requires.

3. That the respondent has never caused the records of the proceedings of the court of inquiry convened in relator's case to be transmitted to the Judge Advocate General of the Army for his review or revision, as the statute requires.

4. That the respondent has never transmitted, or caused to be transmitted, to the President of the United States said record of said court of inquiry for his consideration and action, as the law requires.

5. That the President of the United States has never considered, revised, or acted upon said record of said proceedings, as the law requires.

6. That neither the finding of the final classification board nor the board of officers in the relator's case was ever submitted to or approved by the President of the United States, as the law requires.

7. That the relator was given no opportunity to petition the President of the United States for a revision of the finding of the final classification board nor of the board of officers convened to determine the cause of his final classification.

8. That the relator has not been discharged from the Army of the United States by act of the President.

9. That the President was without the lawful authority to delegate to the Secretary of War the power to approve the finding of the said final classification board, or the said board of officers, or to discharge the relator from the Army of the United States.

10. That the respondent was without legal authority to approve the finding of the said final classification board or the finding of the said board of officers.

11. That the respondent, in violation of the statute, did not inform the relator of the time of the convening of the final classification board to consider his case, or of the time of the convening of the board of officers to determine whether the final classification was due to relator's neglect, misconduct, or avoidable habits.

12. That the respondent did not give to the relator an opportunity to be heard or to present argument upon the law and the facts before the final classification board.

13. That the respondent did not afford the relator an opportunity to appear before or to produce testimony before the board of officers which was convened to determine whether the final classification was due to relator's neglect, misconduct, or avoidable habits, or an opportunity to offer argument upon the law and the pretended facts before such board of officers.

14. That the said answer shows that no sufficient, competent, or legal evidence was considered by the board of officers convened to determine whether the final classification was due to relator's neglect, misconduct, or avoidable habits.

15. That consideration of relator's case by the final classification board and the board of officers was in secret, without notice that it was being considered, and without any opportunity to relator to be heard.

16. That the said petition and answer show that the relator was not accorded due process of law in the proceedings had in his case.

17. That the action taken in relator's case by the final classification board and the board of officers is null and void, inasmuch as it appears by said answer that one member of the preliminary classi-

fication board had previously made an adverse report upon re-
18 lator's efficiency, one member of the final classification board had made a like report, and one member of the board of officers to determine the cause of relator's final classification had sat as a member of a board administratively convened which had classified relator as a "misfit" for the duties he was then performing and it also appearing that the reports of such officer were a part of the record considered by the said final classification board and the board of officers.

18. That the respondent was without legal authority to discharge the relator from the United States.

For other good and sufficient grounds of demurrer apparent on the face of the said answer.

Supreme Court of the District of Columbia.

Thursday, March 10, 1921.

Session resumed pursuant to adjournment, Mr. Chief Justice McCoy presiding.

* * * * * * *

It appearing to the court that the defendant herein, Newton D. Baker, Secretary of War, by resignation on the 5th day of March, 1921, vacated the office he held as such Secretary of War and was succeeded by John W. Weeks, and that it is essential to the protection of the plaintiff's rights in the above-entitled cause that said John W. Weeks be substituted in the stead of Newton D. Baker as the defendant in said cause, and counsel for the respective parties consenting thereto, it is by the court this the 10th day of March, 1921,

Ordered, That the said John W. Weeks, Secretary of War, be, and hereby is, substituted as defendant in said cause in place and stead of the said Newton D. Baker, who resigned from said office as such Secretary of War.

By the court:

WALTER I. McCOY,
Chief Justice.

I consent.

L. H. VAN DOREN,
Asst. U. S. Atty.

Memorandum of Court.

Filed March 12, 1921.

* * * * * * *

I have not been able to reach a decision on all points involved, but am of the opinion that the individual action of the President
19 upon findings of the final classification board is necessary. I therefore sustain the demurrer to the answer. An opinion covering all points may be filed later.

WALTER I. McCOY,
Chief Justice.

Supreme Court of the District of Columbia.

Saturday, March 12, 1921.

Session resumed pursuant to adjournment, Mr. Chief Justice McCoy presiding.

* * * * * * *

Upon hearing the demurrer of petitioner filed herein to the answer of respondent to rule issued in this cause, it is considered that said demurrer be, and it is hereby, sustained.

Rule to Show Cause.

Filed March 18, 1921.

* * * * * * *

On motion of Frederick M. Brown, of counsel for respondent, it is

Ordered, That the petitioner herein show cause before this court on the 21st day of March, 1921, at ten o'clock in the forenoon of that day, why the memorandum decision made herein March 12, 1921, should not be revoked and annulled and why reconsideration of all the issues herein should not be had, and why petitioner's demurrer to the answer herein should not be overruled, and why the petition herein should not be dismissed. And it is

Further ordered, That service of a copy of this rule, if made on petitioner's attorneys on or before the 19th day of March, 1921, shall be sufficient.

WALTER I. McCOY,
Chief Justice Supreme Court.

Washington, March 18, 1921.

Answer to Rule to Show Cause.

Filed March 21, 1921.

* * * * * * *

Now comes the petitioner, William F. Creary, by his counsel, Ansell & Bailey, and in answer to the rule to show cause herein, says that the court ought not to have or take cognizance of
20 the matters and things contained in said rule to show cause for the following reasons, among others:

(1) The said rule to show cause is frivolous in that it is not based upon any alleged error either of law or of fact.

(2) It offends against the established rules of practice.

(3) It does not specify any grounds in support thereof.

(4) It does not ask for the vacation of the order sustaining the demurrer.

(5) It is multifarious, inconsistent, and asks for impossible relief.

(6) It can not be granted in its entirety, and therefore is bad in substance.

Further answering, the petitioner says that ample time and opportunity were afforded counsel representing the Secretary of War to prepare and present argument upon the points involved in the above-entitled cause. On January 3, 1921, the rule was issued against the Secretary of War and the cause was argued fully on January 28, 1921, the court placing no limit of time upon the argument of counsel. The court, at the conclusion of the oral argument, fixed five days for the filing of briefs by counsel representing the respective parties. These were filed. The Secretary of War is represented by four counsel.

Accordingly, it is submitted that no proper grounds exist for the granting of the alleged relief sought; and petitioner prays that said rule be discharged.

ANSELL & BAILEY,
Counsel for William F. Creary.

Supreme Court of the District of Columbia.

Monday, March 21, 1921.

Session resumed pursuant to adjournment, Mr. Chief Justice McCoy presiding.

* * * * * * *

Come now the parties hereto by their respective attorneys of record; thereupon the respondent moves the court to revoke and

annul the memorandum decision made herein March 12, 1921, to reconsider all the issues herein, to overrule the petitioner's demurrer to respondent's answer, and to dismiss the petition; it is considered that said motion be, and it is hereby, overruled without prejudice.

21 *Opinion.*

Filed March 26, 1921.

* * * * * * *

This is an application for a writ of mandamus directing the Hon. John W. Weeks, Secretary of War, substituted as respondent, to vacate an order discharging the relator from the Army of the United States and to restore him to his rank as colonel. A rule to show cause was issued. The respondent answered the petition and the relator demurred to the answer. The undisputed facts raise the questions upon which a decision must be based.

The proceeding calls for a construction of section 24*b* of the act of June 4, 1920, being "An act to amend an act entitled 'An act for making further and more effectual provision for the national defense, and for other purposes,' approved June 3, 1916, and to establish military justice." A copy of the section so far as it relates to the matter in controversy is as follows:

"Sec. 24*b*. Classification of Officers.—Immediately upon the passage of this act, and in September of 1921, and every year thereafter, the President shall convene a board of not less than five general officers, which shall arrange all officers in two classes, namely: Class A, consisting of officers who should be retained in the service; and class B, of officers who should not be retained in the service. Until otherwise finally classified, all officers shall be regarded as belonging to class A, and shall be promoted according to the provisions of this act to fill any vacancies which may occur prior to such final classification. No officer shall be finally classified in class B until he shall have been given an opportunity to appear before a court of inquiry. In such court of inquiry he shall be furnished with a full copy of the official records upon which the proposed classification is based and shall be given an opportunity to present testimony in his own behalf. The record of such court of inquiry shall be forwarded to the final classification board for reconsideration of the case, and after such consideration the finding of said classification board shall be final and not subject to further revision except upon the order of the President. Whenever an officer is placed in class B, a board of not less than three officers shall be convened to determine whether such classification is due to his neglect, misconduct, or avoidable habits. If the finding is affirmative, he shall be discharged from the Army; if negative, he shall be placed on the unlimited retired list with pay at the rate of 2½ per centum of his active pay multiplied by the number of complete years of commissioned service, or service which under the provisions of this act is counted as its equivalent, unless

his total commissioned service or equivalent service shall be less than ten years, in which case he shall be honorably discharged with one year's pay."

22 The relator was placed in class B by the classification board, and thereupon at his request a court of inquiry was convened before which he appeared without counsel. He was not furnished with a full copy of his record in the War Department, but was furnished with copies of the unfavorable parts of it. He was permitted in the court of inquiry to examine all the original record in the presence of the court while it was in session. The final classification board classed the relator in class B, and the board to determine whether such classification was due to his neglect, misconduct, or avoidable habits found in the affirmative, and the relator was discharged from the Army.

The relator did not have notice of the convening of the final classification board or of its action, nor did he have notice of the convening of the board to determine cause or of its action until he received notice of his discharge.

One member of the preliminary classification board had previously in the course of his duty made an adverse report upon relator's efficiency, and one member of the final classification board had made a like report, and previously in the course of his duty one member of the board to determine the cause of relator's classification had sat as a member of a board administratively convened which had classified relator as a "misfit" for the duties which he was then performing.

None of the proceedings were ever laid before the President, but before any action in the relator's case the respondent laid before the President the whole matter of the procedure to be followed and the action to be taken in all cases of classification and determination under the provisions of the statute and received from the President then and there a general authority and direction that the respondent should in all such cases take such action in the name of the President and by his authority and by way of approval, revision, or otherwise as from the circumstances shown by the record in each such case appeared to him to be right and proper. Pursuant to such authority and direction the original respondent as Secretary of War and the Assistant Secretary of War took action as follows:

(1) The signing by respondent at the foot of the record of the final classification board before submission of it to the board to determine the cause of relator's classification the following notation: "Approved, Baker, Secretary of War."

(2) The signing by the respondent at the foot of the record of the board to determine the cause of relator's classification the following: "Majority report approved, Baker, Secretary of War."

(3) Respondent read the records of all boards and of the court of inquiry, and thereupon the Assistant Secretary of War,
23 on his instruction, signed an instrument of approval reading: "The action of the classification board in finally

classifying Colonel William F. Creary, Infantry, in class B is approved by the President and by his direction, a board of officers having determined that such classification is due to the officer's neglect, misconduct, and avoidable habits, Colonel Creary is discharged from the service under the provisions of section 24*b* of the act of Congress approved June 4, 1920. (Signed) W. R. Williams, Assistant Secretary of War."

(4) A special order was issued by order of the original respondent discharging relator from the United States Army signed by the Chief of Staff and authenticated by The Adjutant General.

The statute must be construed in the light of the cases holding that the relator had no right of property in his office (Taylor vs. Beckham, 178 U. S. 548); that his appointment to it did not create a contract right (Butler vs. Pennsylvania, 10 How. 402); and that he enjoys a privilege revocable by the sovereignty at will (Crenshaw vs. United States, 134 U. S. 99). In short the statute constitutes the law of the case. (Reaves vs. Ainsworth, 209 U. S. 296; Ex parte Garland, 4 Wall. 333 at 378).

The relator contests the respondent's claim of authority to act in reviewing the finding of the final classification board and argues that the President alone was authorized to do so. The contention of the respondent is threefold:

(1) That the statute gives the President a mere privilege or option to intervene if he desires;

(2) That properly construed the statute indicates a purpose to require action by the Executive and not by the President personally;

(3) And that aside from such indicated purpose personal action by the President would not be necessary because no judicial act is involved in carrying into effect the purposes of the statute.

If it is optional with the President to order a revision of the proceedings either directly or through the Secretary, certainly they must be called to his attention so that he may exercise his option, as an option implies an opportunity. It can hardly be supposed that the classification board would be permitted to say "this case calls for revision and that case does not," and without some review of the proceedings no intelligent decision could be reached.

Quoting the statute where it says "the finding of said classification board shall be final and not subject to further revision except on the order of the President," respondent in his brief argues that the officer's classification is valid without direct or delegated presidential action. But the answer alleges the adoption of a plan of procedure with the approval of the President indicating that it was supposed that in each case the proceedings leading to the final classification should be reviewed, and in this case the claim is that the action in review of the proceedings was presidential action within the meaning of the statute.

It is intimated that the officer can ask for a consideration of the proceedings by the President, but in the present case the officer did

not know what the decision of the final classification board was until he had been dismissed from the Army. The War Department evidently thought that he had no right to petition the President, as it rendered final judgment without giving him the opportunity. Moreover the statute does not indicate an intention to constitute the President a court of appeals.

The third contention of the respondent is that a review personally by the President of the finding of the final classification board is not necessary because no judicial act is involved in carrying into effect the purposes of the statute.

In Runkle vs. United States, 122 U. S. 543, the Court says (page 557):

"There can be no doubt that the President, in the exercise of his executive power under the Constitution, may act through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. That has been many times decided by this court. (Wilcox v. Jackson, 13 Pet. 498, 513; United States v. Eliason, 16 Pet. 291, 302; Confiscation Cases, 20 Wall. 92, 109; United States v. Farden, 99 U. S. 10, 19; Wolsey v. Chapman, 101 U. S. 755, 769.) "Here, however, the action required of the President is judicial in its character, not administrative. As Commander in Chief of the Army he has been made by law the person whose duty it is to review the proceedings of courts-martial in cases of this kind. This implies that he is himself to consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such a power he can not delegate. His personal judgment is required, as much so as it would have been in passing on the case, if he had been one of the members of the court-martial itself. He may call others to his assistance in making his examinations and in informing himself as to what ought to be done, but his judgment, when pronounced, must be his own judgment and not that of another. And this because he is the person, and the only person, to whom has been committed the important judicial power of finally determining upon an examination of the whole proceedings of a court-martial, whether an officer holding a commission in the Army of the United States shall be dismissed from service as a punishment for an offense with which he has been charged, and for which he has been tried."

What the court held in substance was that the act of reviewing was judicial in its character not solely because the proceeding was judicial, but because the act of reviewing the findings of others based on evidence is essentially a judicial act. True the court quoted from the opinion of an Attorney General which emphasized the judicial nature of a court-martial proceeding from its inception and the importance of it to the officer involved, but the difference between a court-martial proceeding and the one involved here so far as the question of review is concerned is one of degree, the principal difference being that court-martial cases are strictly adversary—

that is to say they go on charges against the officer and may be followed by punishment. In both a hearing is had and evidence is considered. In both facts are found—in court-martial proceedings guilt or innocence, in proceedings like the present unfitness or fitness. In court-martial proceedings the judgment fixes the punishment if the officer is guilty; in the case now being considered the statute specifies the effect of the finding. It is said in Re Brodie, 128 Fed. Rep. 685, 668, a court-martial case: "The superior authority which orders a court-martial and to which its conclusions must be submitted for approval or disapproval is spoken of as the reviewing authority. *Its action being indispensable to a final conclusion or judgment, the reviewing authority is an essential component of the original tribunal,* and is not entirely a court of errors." [Italics supplied.]

The four cases cited in Runkle vs. United States, supra, which the court distinguished from the case before it are relied upon in respondent's brief. A statement of the facts in each will show that they are distinguishable from the present case. In Wilcox vs. Jackson, 13 Pet. 498, it appeared that certain lands were exempt from preemption if they had been reserved from sale by order of the President. Upon the order of the Secretary of War the land there in question had been set aside for use as a military reservation. The court says (page 513):

"The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department. Hence we consider the act of the War Department in requiring this reservation to be made as being in legal contemplation the act of the President; and consequently that the reservation thus made was in legal effect, a reservation made by order of the President within the terms of the act of Congress."

26 In United States vs. Eliason, 16 Pet. 291, it appeared that an officer was claiming allowances under an Army regulation which the Secretary of War had rescinded. The court says (page 302):

"* * *; and the question propounded to the Circuit Court was neither more nor less than this, whether a subordinate officer of the Army, insisting upon a prior regulation, which he thinks either is or ought to be in force, shall obtain from the Government emoluments which a subsequent order from his superior had warned him that it was not in his power to require?"

In the Confiscation Cases, 20 Wall. 92, the statute in question gave the President the power "to cause the seizure" of certain property. The court said that this implied that the seizure was to be made by agents of the President and, following Wilcox vs. Jackson, supra, that the direction of the Attorney General to make the seizure must be regarded as a direction given by the President, but that whether this be so or not it was sufficient that the information

averred that the seizure was made by virtue of the act of Congress and must therefore have been caused by the President.

In United States vs. Farden, 99 U. S. 10, the court says (page 19):

"Under the tenure of office act the President had the power at that time, which was during the recess of the Senate, to suspend the collector until the next session of the Senate, and the act of the Secretary, the head of the Treasury Department, is presumed to be the act of the President. (Wilcox vs. Jackson, 13 Pet. 498)."

The suspension had not been ordered by the Secretary, however, but by the supervisor of an internal revenue district, upon whom the law expressly conferred the power to suspend.

Wolsey vs. Chapman, 101 U. S. 755, was a case of the reservation from sale of public lands and the case followed Wilcox vs. Jackson, supra, the court saying (page 769):

"The truth is, there can be no reservation of public lands from sale except by reason of some treaty, law, or authorized act of the executive department; and the acts of the heads of departments, within the scope of their powers, are in law the acts of the President. * * *."

The respondent cites several cases in addition to those mentioned above, but while the facts in no two of them are alike, they apply the rule of the cases cited in Runkle vs. United States, supra, and only three of them will be mentioned here.

United States vs. Chicago, Milwaukee and St. Paul Railway Co., 218 U. S. 233, is one of the cases principally relied upon by the respondent.

In that case it appears that an act of Congress approved March 3, 1897, as amended, provided for the adjustment of land grants theretofore made in aid of the construction of railroads. If on
27 completion of the adjustment it appeared that lands had been erroneously certified or patented to the railroad by the United States a reconveyance was to be demanded to be followed by appropriate proceedings in case of refusal. If any land had been sold by the grantee company to purchasers in good faith, demand was to be made for payment of an amount equal to the Government price for similar lands. This action was brought under that act.

The grant to the railroads was of the familiar type—place lands and lieu lands. Lands previously reserved to the United States for any purpose by any act of Congress were excepted from the grant. The defendant or its predecessor in interest by completion of its line and filing maps as required converted its inchoate title into a complete title.

The Government contended that before the passage of the act under which defendant claimed the lands in dispute they had been reserved under the swamp-land act of September, 1850, which granted swamp lands to the States and so were not within the grant to the defendant. The contention of the defendant was that these lands were not in fact swamp lands granted by the act of 1850, and that

therefore nothing done under the act could avail the State except a decision by competent authority in due form that the lands were in fact within the class of swamp lands mentioned in the act of 1850.

The court then quotes the act of 1850, which was one giving to the States swamp and overflowed lands which answered a certain description. It made it the duty of the Secretary of the Interior as soon as practicable to plat the kind of lands covered by the statute and to transmit the plats to the governor of the State in which they were located, and on his request to issue patents to the State. The proceeds of the sale by the States of the lands were to be used, as far as necessary, by the States for reclaiming the lands. In 1876 the State of Iowa, or some of the counties therein, claimed the lands as swamp lands, and the defendant's predecessors claimed them as place lands under the grant to them. The Commissioner of the General Land Office, upon public hearings on those claims after notice to all the parties, held that the lands in dispute were not swamp lands within the meaning of the act of 18[illegible] and that the State of Iowa had never been entitled to them thereunder. This hearing was held not under the act of 1850 but under an act of Congress approved March 5, 1872, ch. 39, 17 Stat. 37, which provided:

"That the Commissioner of the General Land Office is hereby authorized and required to receive and examine the selections of swamp lands in Lucas, O'Brien, Dickinson, and such other counties in the State of Iowa as formerly presented their selections to
28 the surveyor general of the district including that State, and allow or disallow said selections, and indemnity provided for according to the acts of Congress in force touching the same at the time such selections were made, without prejudice to legal entries or the rights of bona fide settlers under the homestead and preemption laws of the United States prior to the date of this act."

The court held that the commissioner's decision under the act of 1872 was final, adding:

"In any view, that decision was in contemplation of law one by the Secretary of the Interior, who, by the original act of 1850, was directed to make out accurate lists or plats of the lands described by that act as swamp and overflowed lands. (Wilcox vs. Jackson, 13 Pet. 498; Wolsey vs. Chapman, 101 U. S. 755, 768.)"

The court did not hold that the hearing before the Commissioner of the General Land Office was had under authority delegated by the Secretary of the Interior because the act of March 5, 1872, expressly conferred upon the Commissioner of the General Land Office jurisdiction to hear and determine, and a decision by the Secretary would have been without jurisdiction. And deciding that the facts were conclusively established by the finding of the commissioner under the act of 1872, the court then says "*In any view* [italics supplied] the decision by the commissioner was good under the act of 1850." The court then goes on to speak of the hearing above mentioned, but does not say that it was under the act of 1850, nor could it so hold, as hear-

ings were not provided for under that act. Selections under the act of 1850 "constituted a determination based on observation and examination that the lands were not swamp and overflowed, etc." (McCormick vs. Hayes, 159 U. S. 332, 347; Railroad Co. vs. Smith, 76 U. S. 95, 100. The Secretary could not be compelled to proceed under the act. (French vs. Fyan, 93 U. S. 196.)

The case of the United States vs. Chicago, Milwaukee and St. Paul Ry. Co. therefore is not one of delegated authority.

In William vs. United States, 1 How. 290, it was shown that the President was authorized to make advances to various disbursing officers as might seem necessary to permit the discharge of their functions. The disbursing officer in this case was a United States marshal. The President in writing authorized the Secretary of the Treasury to make the advances. The court said that it was the duty of the President to superintend administrative officers, not to be himself the sole administrative officer. To the same effect is United States vs. Freeman, 3 How. 555, which was also a case of disbursing public moneys, in this instance for double rations to be allowed "as the President of the United States shall from time to time direct having respect to the especial circumstances of each post."

29 By the Army Regulations the President delegated the administration of this act to the Secretary of War.

The decision in re Brodie, 128 Fed. 833, is not in conflict with the views expressed above. There the court held that no statute forbidding it was competent for the President, through the Secretary of War, to establish rules and regulations laid down in the manual for courts-martial. Fixing a run for guidance of departmental action in matters of procedure obviously does not require the direct personal attention of the President, otherwise he would be the sole administrative office- (Williams vs. United States, supra) of the War Department.

In the act under consideration it appears that where Congress intended to allow the delegation of authority conferred on the President it used apt words for the purpose, for section 5 contains the following: "The Chief of Staff shall preside over the War Department General Staff and *under the direction of the President, or of the Secretary of War under the direction of the President,* shall cause to be made," etc. [Italics supplied.]

The conclusion is that the President's individual action is called for in consideration of the findings of the final classification board.

The relator complains that he was not furnished with a full copy of the official records on which the proposed classification was based, but he did not so far as shown demand a copy of his entire record before the court of inquiry convened at his request nor object to proceeding without it. There was jurisdiction of the subject matter and of the person, and it must be held that the relator by proceeding without protest can not now object. (See Bishop vs. United States, 197 U. S., 334-340.)

The contention of the relator that he was entitled to a hearing before the final classification board can not be sustained. There is nothing in the statute indicating that Congress intended that there

should be a hearing preliminary to final classification except that before the court of inquiry. That court, it is true, had no power to make findings or to determine anything, but it is a fair inference that where Congress has provided for a certain sort of hearing during the classification proceeding none other can be had.

There is nothing in the statute to indicate that the action by the classification board can be challenged if a member has previously expressed an opinion as to the officer's fitness. This conclusion would follow from the holding that a hearing before these boards is not a matter of right. It has been held by most respectable authority that a judge may sit on an appeal in a case heard by him in the first instance. (Pierce vs. Delamater, 1 N. Y., 17; Biggins vs. Lambert, 213 Ill., 625.) It is quite obvious why an officer should fear results if his case may be passed on by one who has prejudged him—especially as all the board may have done so; but any unfairness in that respect may be corrected by order of the President. (See Reaves vs. Ainsworth, 219 U. S., 296, 306.)

As the statute speaks of the convening of only one classification board it seems that two boards were not contemplated. It used the words "final classification board," but it also says that after the taking of testimony before the court of inquiry the record of that court shall be sent to the final classification board for "reconsideration" of the case. It seems that the word "consideration" would have been used were separate boards intended.

The relator claims that he was entitled to a hearing before the board to determine cause.

The act provided for two proceedings, one leading to the classification for unfitness and the other to determine cause. The respondent so construed the statute for he passed upon the finding of the former before sending the case to the latter.

The provision in respect to the duty of the board to determine cause is the most difficult to interpret. It reads, to quote it again, "Whenever an officer is placed in class B a board of not less than three officers shall be convened to determine whether such classification is due to his neglect, misconduct, or avoidable habits." Literally read it seems to require the board to say what was the mental operation of the final classification board, but that would be an unreasonable interpretation. It must have been intended that the board should determine whether the unfitness for service which was the reason for placing the officer in class B was due to any of the causes mentioned.

Taking the purpose of the statute to be as stated, the important question to be decided is whether it was intended that the board to determine cause is to consider only the officer's record as it was before the final classification board or whether he is to be given a hearing. To reach the conclusion that the former course was contemplated the objection must be met that the final classification board had the record and could just as will have been given the power to decide and so avoid duplication of work. To which it may be replied that effects are more obvious than the causes of them and that the latter call for more careful study; also that retirement from

the service of those who are unfit calls for speedier action so that the Army shall be properly officered, and therefore the intention of Congress was that the final classification board should not be held back in accomplishing its work by having to determine cause. Other reasons might be assigned perhaps to support respondent's contention. But such contentions assume that Congress had in
31 mind that the board to determine cause would have before it all the officer's paper record and the report of his testimony before the court of inquiry and that these would contain all that could be adduced as to the cause of his unfitness. To support this conclusion it must be argued further that Congress assumed that the officer's paper record sent to the court of inquiry would in every case inform the officer not only of the respects in which he was deemed unfit but of the discreditable causes which it would be later claimed brought about that unfitness—an assumption which can not be made when cases can be readily imagined in which it would not be likely to accord with the facts or at least possibly would not, for instance, — cases of nervous breakdown.

But what about the officer who has not demanded a hearing before a court of inquiry because he admits unfitness warranting his being placed on the retired list? It is argued that he takes his risk in not asking for a court of inquiry, which is for all practical purposes to say that every class B officer will be forced to demand an opportunity to appear before such a court though not conscious of any wrong-doing—almost a confession. If he does not ask to be heard before a court of inquiry, he may not know what his paper record shows, and until he receives notice of his discharge from the Army for causes of which he was not notified, he may not know that anyone even suspected him of misconduct. When he has reiceived his order of discharge, if the practice followed in the present case is adopted, he will not have been informed of the charges and may be entirely ignorant of what they were. If Congress intended a procedure that might lead to any such result, certainly it would have made its intention obvious.

As Congress did not explicitly say that there should be a hearing before the board to determine cause the question is not free from difficulty, but as we have the outstanding fact that an officer of the Army may be discharged in effect on charges to his discredit and without honor on an adverse finding of the board, it is more reasonable to infer that Congress intended that an officer should have whatever rights any public officer has where causes for removal are specified. In Reagan vs. United States, 182 U. S. 419, 425, the court says:

"The inquiry is therefore whether there were any causes of removal prescribed by law, March 1, 1895, or at the time of the removal. If there were, then the rule would apply that where causes of removal are specified by constitution or statute, as also where the term of office is for a fixed period, notice and hearing are essential. If there were not, the appointing power could remove at pleasure or for such cause as it deemed sufficient."

32 In Shurtleff vs. United States, 189 U. S. 311, the court says (page 314):

"It must be presumed that the President did not make the removal for any cause assigned in the statute, because there was given to the officer no notice or opportunity to defend."

And at page 317:

"We are not unmindful of the force of the contention that, if the power of removal is not limited to the causes specified in the statute, that then those words providing for a removal for inefficiency, neglect of duty, or malfeasance in office, fulfill no function, because without them the President has unlimited power of removal, and with them he still has the same power.

"It may be said, however, that there is some use for the provisions for removal for the causes named in the statute. A removal for any of those causes can only be made after notice and an opportunity to defend, and therefore, if a removal is made without such notice, there is a conclusive presumption that the officer was not removed for any of those causes, and his removal can not be regarded as the least imputation on his character for integrity or capacity * * *."

In Kalbfus vs. Siddons, 42 App. D. C. 310 at 318, the court says:

"* * * When, therefore, Congress uses this language [shall not be removed except for inefficiency, neglect of duty, or malfeasance in office], it limited the right of removal in the commissioners to the causes specified, and notice and hearing thereafter were requisites to the exercise of their jurisdiction * * *."

And further quoting 2 Dill. Mun. Corp. 5th Ed. Sec. 480:

"The proceedings in all cases where the amotion is for cause is adversary or judicial in its character; and if the organic law of the corporation is silent as to the mode of procedure, the substantial principles of the common law as to proceedings affecting private rights must be observed."

It must be held that the relator was entitled to notice of the charges against him and to a hearing before the board to determine cause.

Something more than is alleged in the petition must be shown to raise a question of bias on the part of a member of the board to determine cause. An officer may be a "misfit" and another officer may think so and still be of the opinion that the conduct of the former has been unexceptionable so far as its moral quality is concerned. The answer denies bias.

That the relator might have been discharged under the 118th article of war is not to the point. He was not discharged under that authority.

There is no requirement in the statute of a reference to the Judge Advocate General so as to make action by him a preliminary to a decision under the act here in question.

No interpretation of the statutes said to be in pari materia that has been called to the court's attention is in conflict with the foregoing conclusions.

WALTER I. McCOY,
Chief Justice.

Memorandum of Court.

Filed April 11, 1921.

* * * * * * *

Section 399 of the code is broad enough to permit the amendment of an answer to a petition for a writ of mandamus.

As this matter stands, a motion should be made accompanied by the proposed answer if the respondent wishes to amend.

WALTER I. McCOY,
Chief Justice.

Motion for Leave to File Answer.

Filed April 20, 1921.

* * * * * * *

Now comes John W. Weeks, appearing herein specially for the purpose of making this motion and not appearing herein otherwise, and moves this court, upon his affidavit hereto annexed, verified the 16th day of April, 1921, and upon all the papers and proceedings herein, for an order permitting him to file herein the answer, a copy whereof is hereto annexed.

(Signed) FREDERICK M. BROWN,
Attorney for John W. Weeks,
Appearing Herein Specially.

Affidavit of John W. Weeks.

* * * * * * *

John W. Weeks, being duly sworn, deposes and says as follows:

1. I have to-day been informed that my name has, by order of the court, been substituted for that of Newton D. Baker as party defendant herein. I had no previous information of there being any action pending against me personally.

2. I have not been served with a summons or other process of the court herein, nor have I at any time had notice of any motion to substitute me for Newton D. Baker as the party defendant herein. I have not heretofore conferred upon anyone authority to enter my appearance or to represent me in this ac-

tion or to consent to my being substituted for Newton D. Baker as the party defendant herein.

3. I am unwilling to appear voluntarily herein unless I am permitted to file the answer of which a copy is hereto annexed and made a part hereof; but I am desirous of entering a voluntary, general appearance and of being represented by the United States attorney in case permission to file said answer is granted by the court. I am unwilling to accept as my answer herein the answer heretofore filed herein by and in the name of Newton D. Baker. Should the court refuse permission to file the answer, a copy whereof is hereto annexed, I desire that I be served with such summons, process, or notice as shall be deemed appropriate to cast upon me the duties and obligations of a party defendant, in case it is intended to continue the action and to enter final judgment therein.

4. I have authorized Frederick M. Brown, colonel, judge advocate, United States Army, to appear specially herein on my behalf in order to move for an order permitting me to file the answer, a copy whereof is hereto annexed; and to stipulate that the filing of such answer shall constitute a general appearance herein.

JOHN W. WEEKS.

Sworn to before me this the 16th day of April, 1921.

[SEAL.] F. A. ALLMUTH,
Notary Public, District of Columbia.

My commission expires Feb. 27, 1924.

Answer of Defendant, John W. Weeks, Secretary of War, to Petition for Mandamus and to Rule to Show Cause.

* * * * * * *

John W. Weeks, Secretary of War, now and at all times saving and reserving unto himself all exceptions to the imperfections, uncertainties, and defects in the petition for writ of mandamus filed herein, and reserving unto himself the benefit of the lack of jurisdiction of the court, appearing on the face of said petition, to grant the relief prayed for, and the lack of jurisdiction of the court to direct him, as Secretary of War, to perform the act in question, and relying on the same, as if demurrer had been specifically interposed, for answer to said petition, or so much thereof as is material, and to said rule to show cause, says on information and belief as follows:

1. Defendant admits that the allegations contained in the first paragraph of the petition were true at the time of the filing thereof.

35 2. As to the matters alleged in the second paragraph of the petition, defendant admits the making of findings of moral, professional, and physical fitness upon which petitioner was appointed and commissioned first lieutenant, captain, major, and lieutenant colonel of Infantry, respectively; but defendant denies the

materiality of the allegations that such findings or any of them were duly or correctly made, and denies any knowledge or information as to the truth and fact in that regard. Defendant alleges that the present standard of professional fitness to qualify an officer to become or to remain a colonel or Infantry is very much higher than the standards of fitness which were applicable to the grades of first lieutenant, captain, major, and lieutenant colonel, respectively, at the several times when findings of petitioner's professional fitness for these grades were made as aforesaid. Defendant further alleges that petitioner's commission of 27 December, 1919, as lieutenant colonel was not in the 5th, or in any particular regiment, but was a commission as lieutenant colonel of Infantry, and that petitioner's commission of 20 July, 1920, as colonel was a temporary commission granted in virtue of a recess appointment by the President, which appointment has not been followed by nomination to and confirmation by the Senate of the United States. Said commission was to expire not later than at the end of the next session of the Senate. Defendant thereupon avers that petitioner's tenure of the office of colonel in the Army of the United States has expired by constitutional and statutory limitation of the term thereof, and that neither defendant nor this court nor both have power to make petitioner a colonel or to restore him to the office of colonel as prayed by petitioner herein. Defendant further alleges that petitioner has never received a permanent appointment, or been permanently commissioned a colonel on the active list of the Regular Army. Defendant denies that petitioner as an officer has always rendered efficient service and alleges petitioner's services, prior to his being discharged in virtue of the order of November 17, 1920, mentioned in the second paragraph of the petition, were not such as to justify the expectation that his services, if retained on the active list of the Regular Army, would be of the standard of efficiency and professional skill required of officers of the grade of colonel of Infantry in the Regular Army. Respondent thereupon avers that petitioner's past services and his probable prospective services were not such as to justify retaining him on the active list of the officers of the United States Army under the terms of section 24*b* of the Army reorganization act of June 4, 1920. Defendant further alleges that petitioner has at times been guilty of neglect of duty, misconduct, or disqualifying habits, and that, in accordance with the requirements of section 24*b* of said act of
36 Congress, it has been, to wit, prior to the order of November 17, 1920, quoted in the second paragraph of the petition, duly found and determined that petitioner had been guilty of neglect, misconduct, and avoidable habits causing his being classified in class B. Defendant admits the remaining matters alleged in the second paragraph of the petition.

3. As to the matters alleged in the third paragraph of the petition, defendant admits and alleges that a court of inquiry was convened by the President to investigate the question whether petitioner should be continued in class B and to investigate and consider, in respect of the status of petitioner, all other facts and questions which, by statute

or otherwise, said court of inquiry was required or permitted to investigate or consider and also to take testimony, collect evidence, and hear argument pertinent to said facts and questions; and defendant alleges upon information and belief that said court of inquiry actually investigated said facts and considered said questions and performed all and singular its other duties aforesaid. Defendant admits the remaining matters alleged in the third paragraph of the petition.

4. As to the matters alleged in the fourth paragraph of the petition, defendant alleges that prior to, or in the said court of inquiry, a full copy of all unfavorable reports, notations, or papers either considered by the provisional or original classification board in petitioner's case or afterwards considered by the final classification board therein or by the board convened to determine the cause of classification was delivered to petitioner for him to retain permanently and to carry away and to become his property; and that the same were the only records upon which his provisional and final classification in class B were based or proposed to be based and upon which the findings or determinations of said three boards or any of them were based. Defendant further alleges that in said court of inquiry a full copy of the entire record of petitioner's service as an officer of the Army from the date of his first commission therein to the date of the convening of said court was placed at petitioner's disposition or was tendered to him to examine, study, copy, and otherwise use, with full opportunity to use said full copy in uninterrupted and confidential consultation with counsel or with any one whom he might desire to consult, and that petitioner had the full, perfect, and complete use of all said records, to all intents and purposes of equal benefit and advantage to petitioner, in respect of the protection of his interests or rights as an officer on the active list of the Regular Army, as if he had been made the sole owner and possessor thereof or a copy thereof; but that, except for the unfavorable reports, notations, and papers aforesaid, petitioner was not permitted to carry said records away or to treat them as his own property. Thereupon de-
37 fendant avers that petitioner has been furnished with a full copy of all official records relating to his services within the intent and meaning of the statute aforesaid. Defendant further alleges that no demand for the furnishing to him of other or more complete records, documents, or papers, or copies thereof, was made by or on behalf of petitioner in the court of inquiry; nor was any protest or objection to the sufficiency of the records, documents, and papers that were actually furnished to him made by, or on behalf of, the petitioner in said court of inquiry, nor has any such demand, protest, or objection been made at any time before the institution of the action herein. Defendant further avers that the mandate and requirements of said statute have been, in all respects, complied with and carried into effect and that the proceedings mentioned in the fourth paragraph of the petition are valid and effectual. Defendant admits that the record of proceedings in the court of inquiry has not been transmitted to the Judge Advocate General and has not been received or reviewed by him. Defendant admits and alleges that no officer or board of officers has been advised of the illegal

character of the proceedings of the court of inquiry and alleges that said proceedings were in fact not illegal, but were valid, regular, and legal. Defendant admits that the record of said proceedings has not been transmitted to the President personally and has not been considered, reviewed, or acted upon personally by him, but defendant alleges that said record was duly transmitted, considered, reviewed, and acted upon in manner directed and authorized by the President of the United States; as hereinafter, to wit, in the ninth paragraph hereof, more fully and at large appears. Defendant denies all and singular the remaining matters alleged in the fourth paragraph of the petition.

5. As to the matters alleged in the fifth paragraph of the petition, defendant alleges that petitioner at no time requested that he be given notice of the acts or proceedings in said paragraph mentioned and defendant admits that such notices were, in fact, not given. Defendant alleges that petitioner had ample opportunity to petition the President for a revision of any or all of said proceedings or for any other action by the President to which petitioner might have conceived himself entitled. As to the remaining matters alleged in said fifth paragraph of the petition, defendant has no knowledge nor any information sufficient to form a belief and demands strict proof thereof, if material.

6. As to the matters alleged in the sixth paragraph of the petition, defendant admits that no notice was given petitioner of the meeting of the final classification board or of the board of officers to determine the cause of petitioner's classification, and he ad-
38 mits that the letter of the petitioner's attorneys of December 8, 1920, was sent as therein alleged and received at the War Department, and he alleges that The Adjutant General did on the 18th day of December, 1920, answer the letter of petitioner's counsel and did thereby inform petitioner that a copy of the proceedings of the final classification board in his case would not be furnished him but that he or his counsel might examine the record of such proceedings and that thereafter petitioner's counsel did call at the War Department and examine the record of such proceedings. Defendant admits that the final classification board held and decided in effect that petitioner should be eliminated from the active service of the Army and that the board convened to determine the cause of classification held and decided in effect that petitioner should be absolutely discharged from the office in the Army, but defendant denies that said determination or either of them were made or influenced by the orders of the original defendant herein. Defendant admits that Special Order No. 271-O of November 17, 1920, set forth in the second paragraph of the petition was the order of the original defendant herein. Defendant denies all and singular the remaining matters alleged in the sixth paragraph of the petition.

7. As to the matters alleged in the seventh paragraph of the petition, defendant admits that the proceedings of the two boards therein mentioned, to wit, the final classification board and the board convened to determine the cause of classification were had without notice

to petitioner or opportunity to be heard in the actual presence of either of them and defendant alleges that petitioner asked no opportunity to be heard in the actual presence of said boards, or either of them; but defendant alleges that petitioner's case was duly presented to each of those boards and that hearings were granted to petitioner and were had by said boards respectively, in that testimony, statements, and evidence adduced by petitioner and on his behalf in the court of inquiry, together with a copy of all other proceedings in the court of inquiry in petitioner's case, were submitted to and considered by each of said boards. Defendant denies the remaining matters alleged in the seventh paragraph of the petition.

8. As to the matters alleged in the eighth paragraph of the petition, defendant alleges that one member of the provisional or preliminary classification board had previously in the course of his duty made an adverse report upon petitioner's efficiency, and that previously in the course of his duty one member of the final classification board had made a like report, and that previously in the course of his duty one member of the board, to determine the cause of petitioner's classification, had sat as a member of a board administratively convened, which had characterized petitioner as a "misfit" for the duties he was then performing, but defendant denies that said officers or any of them were biased or disqualified from sitting on the several boards of which they were members or from a fair performance of their duty as such. Defendant denies all and singular the remaining matters alleged in the eighth paragraph of the petition.

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9. As to the matters alleged in the ninth paragraph of the petition, defendant admits that neither he nor the original defendant herein has caused the record of the proceedings of said court of inquiry, of the final classification board, or of the board convened to determine the cause of classification to be transmitted to the President, and he admits that said proceedings have not been reviewed, considered, or acted upon personally by the President. Defendant alleges that prior to any determination or classification in petitioner's case the original defendant laid before the President the whole matter of procedure to be followed and the action to be taken in all cases of classification and determination under the provisions of section 24*b*, and he received from the President general instructions, directions, and authority in substance and to the effect that, except as to cases wherein he, the said Secretary of War, should at any time conclude that personal attention and consideration by the President ought to be had in virtue of the importance of the matter or for any other reason, the said Secretary of War should take such action in the name of the President and by his authority by way of approval, revision, or otherwise as from the circumstances shown by the record in each such case appeared to him, the said Secretary of War, to be right and proper. Pursuant to such authority and direction so received by the original defendant herein from the President, he, as Secretary of War, after due consideration concluded that the case of the petitioner herein did not by reason of its importance, or for any

other reason, merit the personal attention and consideration of the President. The said Secretary of War thereupon took the following action, which was in all respects in accordance with such directions of the President:

(1) The signing by the original defendant, on behalf and by authority of the President, at the foot of the record of the final classification board, but prior to the submission of such record to the board to determine the cause of petitioner's classification, of the following notation:

"Approved:
"BAKER,
"Secretary of War."

(2) The signing by the original defendant, on behalf and by authority of the President, at the foot of the record of the board
40 to determine the case of petitioner's classification, of the following notation:

"Majority report approved:
"BAKER,
"Secretary of War."

(3) The reading by the original defendant in person of the records of the preliminary classification board, the court of inquiry, the final classification board, and the board to determine the cause of classification in petitioner's case, and the signing by W. R. Williams, Assistant Secretary of War, pursuant to instructions to that effect given him by the original defendant after such reading, and on behalf of and by authority of the President, on November 17, 1920, subsequent to the action of the board to determine the cause of petitioner's classification, of an instrument of approval, a copy of which is annexed to the original answer and marked "Exhibit 1," which is prayed to be taken as a part hereof.

(4) The issuance on November 17, 1920, by order of the original defendant on behalf and by authority of the President of a special order discharging petitioner from the United States Army, of which a true copy, marked "Exhibit 2," is attached to the original answer herein and made a part hereof. Defendant denies all and singular the remaining matters alleged in the ninth paragraph of the petition.

10. Defendant denies the allegations and conclusions of law contained in the tenth paragraph of the petition. He alleges that the acts and proceedings of which petitioner complains and which he erroneously characterizes as unlawful were essentially the following:
Immediately after the enactment of the act of Congress of June 4, 1920, and in accordance with section 24*b* thereof the President convened a board of not less than five general officers, as shown by Exhibits 3 and 4, attached to the original answer herein which are true copies respectively of the order convening said board and an order amendatory thereof, said board has been since its appointment

and is now engaged in arranging all officers of the Army in two classes, namely, class A, consisting of officers who should be retained in the service, and class B, of officers who should not be retained in the service, and said board in accordance with said statute provisionally arranged petitioner in class B, and petitioner thereupon requested that a court of inquiry be convened before which he might be given an opportunity to appear, and accordingly a court of inquiry was convened before which petitioner appeared; in such court petitioner was furnished with a full copy of the official records upon which his proposed classification was based, as *had* been more fully set out in paragraph 4 of this answer, and was given by and before said board full and free opportunity to present testimony of
41 himself and others in his behalf and to be heard fully, of which opportunities he availed himself so far as he desired. The record of such court of inquiry was forwarded to the final classification board for reconsideration of petitioner's case, and after such consideration the final classification board placed petitioner in class B, which action was approved as more particularly set forth in paragraph 9 of this answer. The President has not ordered further revision of said finding of said classification board; but in the manner more particularly set forth in the ninth paragraph hereof, the President has decided not to order further revision thereof. After petitioner was placed in class B as aforesaid, a board of three officers was convened to determine*d* whether such classification was due to his neglect, misconduct, or avoidable habits, as shown by Exhibits 5 and 6 annexed to the original answer herein which are true copies, respectively, of the order convening said board and an order amendatory thereof, and which are made a part hereof. The finding of a majority of said board was affirmative, that is to say, that the classification of petitioner in class B was due to his neglect, misconduct, or avoidable habits; and the finding of one member of said board, negative. Thereafter the original defendant, acting on behalf of and by authority of the President approved said majority report, and subsequently, to wit, on November 17, 1920, by the order, a copy whereof, marked "Exhibit 2," is annexed to the original answer herein and made a part hereof, petitioner was discharged from the Army in accordance with the statute hereinbefore cited and in all respects as provided by law.

Wherefore, having fully answered the allegations of plaintiff's petition, so far as he is advised by counsel that it is necessary for him to answer, and having shown cause why the writ of mandamus should not issue as prayed in said petition, this defendant prays that he may hence be dismissed with his reasonable costs in this behalf sustained.

(Signed) JOHN W. WEEKS,
Secretary of War.

JOHN E. LASKEY,
Attorney for the United States
in and for the District of Columbia.
L. H. VAN DOREN,
Assistant Attorney for the United States
in and for the District of Columbia.
FREDERICK M. BROWN,
Judge Advocate, U. S. Army,
Of Counsel for the Defendant.

42 DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the foregoing answer by me subscribed, and know the contents thereof; and that the statements of fact therein made I believe to be true.

(Signed) JOHN W. WEEKS.

Subscribed and sworn to before me this 16th day of April, 1921.

(Signed) F. A. ALLMUTH,
Notary Public, District of Columbia.

My commission expires Feb. 27, 1924.

Notice.

* * * * * * *

Messrs. Ansell & Bailey,
Attorneys for Petitioner:

Take notice that the aforegoing motion will be for hearing at — on the 22nd day of April, 1921, at 10.00 a. m., or as soon thereafter as counsel may be heard.

Washington, April 18, 1921.

(Signed) FREDERICK M. BROWN,
Attorney for John W. Weeks,
Appearing Herein Specially.

Memorandum Opinion.

Filed May 23, 1921, as of April 22, 1921.

* * * * * * *

A motion was made upon the affidavit of the respondent verified April 16, 1921, and upon all the papers and proceedings herein for an order permitting him to file an answer. The notice of motion reads in part "Now comes John W. Weeks appearing herein specially for the purpose of making this motion and not appearing otherwise, etc." The court declined to entertain the motion because of the form of the appearance.

WALTER I. McCOY,
Chief Justice.

Supreme Court of the District of Columbia.

Friday, April 22d, 1921.

Session resumed pursuant to adjournment, Mr. Chief Justice McCoy presiding.

* * * * * * *

Upon consideration of the motion of John W. Weeks, Secretary of War, respondent, filed herein April 20, 1921, by his
43 Attorney, for an order permitting him to file herein the amended answer accompanying said motion, it is ordered that the same be, and hereby is, denied.

Motion to Dismiss.

Filed April 23, 1921.

* * * * * * *

Now comes John W. Weeks appearing herein specially for the purpose of making this motion and not appearing herein otherwise and moves this court, upon his affidavit verified the 16th day of April, 1921, which affidavit is filed with a motion herein that was heard before, and determined by this court on the 22nd day of April, and upon all the papers and proceedings herein, for an order dismissing this action by reason of petitioner's failure to apply for or to cause the service of any process or order upon the substituted defendant to the end that he may be brought within the power and authority of the court for the purposes set forth in the petition herein and by reason of petitioner's failure to serve notice upon said substituted defendant with like purpose, and by reason of the court's having failed to acquire jurisdiction over the person of said substituted defendant; and for such other relief predicated upon the defects aforesaid as may be just.

FREDERICK M. BROWN,
Attorney for John W. Weeks,
Appearing Herein Specially.

Notice.

* * * * * * *

Messrs. Ansell & Bailey,
Attorneys for Petitioner:

Take notice that the aforegoing motion will be for hearing on the 29th day of April, 1921, at 10 a. m. before his honor, Chief Justice McCoy.

Washington, April 23, 1921.

FREDERICK M. BROWN,
Attorney for John W. Weeks,
Appearing Herein Specially.

44 *Proposed Rule to Show Cause.*

* * * * * * *

On reading and filing the annexed affidavit of Frederick M. Brown, verified the 23rd day of April, 1921, it is

Ordered, that petitioner show cause before me in open court on the 29th day of April, 1921, why the substituted defendant should not have leave to file such answer herein as is referred to in said affidavit or such other answer or amended answer as the interests of justice require. And it is

Further ordered, that neither the procuring of this order nor the argument and submission of the question aforesaid shall be deemed to constitute a general appearance of the substituted defendant or a waiver of the special appearance under which said defendant has noticed for hearing and intends to submit for determination a motion to dismiss the petition for want of jurisdiction of the person of the party defendant; provided nevertheless that nothing in this order contained shall be deemed to affect petitioner's right to cause the continued pendency of this application for leave to file a new answer, after a decision denying said motion to dismiss, or the filing of a new answer if such leave be granted, to be held and treated by the court as a general appearance herein, in case petitioner has such right under the law and according to the principles of justice. And it is

Further ordered, That service of a copy of this order upon the attorneys for the petitioner if made on or before the — day of April, 1921, shall be sufficient.

____ ____,
Chief Justice Supreme Court.

Affidavit of Frederick M. Brown.

Filed April 25, 1921.

* * * * * * *

Frederick M. Brown being duly sworn, deposes and says as follows:

1. By direction of John W. Weeks, the substituted defendant herein, I have to-day filed in the office of the clerk of this court a motion to dismiss the petition herein by reason of failure to obtain judisdiction of the person of the substituted party defendant, appearing specially for the purpose of said motion; and I have caused notice of hearing of said motion for April 29, 1921, to be served on petitioner's attorneys.

45 2. Subsequent to the filing of said motion, I have been directed by the substituted defendant herein that, if said motion to dismiss shall be denied on the ground that in the view taken by the court it already has jurisdiction of the person of the substituted party defendant, a motion or application shall be made for an order granting leave to file the answer a copy whereof was annexed to the motion made and decided herein April 22, 1921, except that a first page, a copy whereof is hereto annexed, is to be substituted for the first page of the above-mentioned answer. And for the purpose of making said last-mentioned motion or application, I have been authorized to enter, immediately after the denying of the motion to dismiss on the ground aforesaid, if said motion shall in fact be denied, such appearance as shall be necessary to enable the motion or application aforesaid for leave to file a new answer or an amended answer to be heard and determined on the merits; including a general appearance on behalf of the substituted party defendant in case the court refuses to hear and determine said motion otherwise.

3. The new answer which it is desired to file has been read over in my presence by Newton D. Baker, the original defendant herein, and he expressed to me his approval thereof in substance and form and as to the correctness and accuracy of the allegations of fact contained in it.

4. I desire to obtain an order granting leave to file a new answer in accordance with the authority and directions aforesaid. Great confusion and embarrassment have, however, resulted to the War Department and to the Army owing to the pendency of this action. By reason of this action, all promotions to commissioned offices in the Army in the grade of colonel and in grades inferior thereto are being delayed, hampered, and limited, if not entirely prevented. In order to diminish as much as possible the duration of the pendency of this litigation, I desire that argument upon both the questions aforesaid (in so far as further argument is asked for or permitted) shall be had at the same time, to wit, on April 29, 1921, the next motion day.

5. In order to make it clear that the substituted defendant insists upon his special appearance until after his motion to dismiss shall be denied (if, indeed, it shall be denied), I feel that an order to show cause of the nature herewith submitted is necessary.

FREDERICK M. BROWN.

Sworn to before me this the 23d day of April, 1921.

[SEAL.] N. CURTIS LAMMOND,
Notary Public.

46 In the Supreme Court of the District of Columbia.

At Law.

No. 64936.

THE UNITED STATES OF AMERICA ex Relatione WILLIAM F. CREARY, Petitioner,

v.

JOHN W. WEEKS, Secretary of War, Defendant.

Answer of Defendant, John W. Weeks, Secretary of War, to Petition for Mandamus and to Rule to Show Cause.

John W. Weeks, Secretary of War, now and at all times saving and reserving unto himself all exceptions to the imperfections, uncertainties, and defects in the petition for writ of mandamus filed herein, and reserving unto himself the benefit of the lack of jurisdiction of the court, appearing on the face of said petition, to grant the relief prayed for, and the lack of jurisdiction of the court of and over the person of the above-named party defendant herein and also the lack of jurisdiction of the court to direct him, as Secretary of War, to perform the act in question, and relying on the same for all purposes and also in like manner as if demurrer had been specifically interposed, for answer to said petition, or so much thereof as is material, and to said rule to show cause, says on information and belief as follows:

1. Defendant admits that the allegations contained in the first paragraph of the petition were true at the time of the filing thereof.

2. As to the matters alleged in the second paragraph of the petition, defendant admits the making of findings of moral, professional, and physical fitness upon which petitioner was appointed and commissioned first lieutenant, captain, major, and lieutenant colonel of Infantry, respectively; but defendant denies the materiality of the allegation that such findings or any of them were duly or correctly made and denies any knowledge or information as to the truth and fact in that regard. Defendant alleges that the present standard of professional fitness to qualify an officer to become or to

1.

Fiat.

Refused.

WALTER I. McCOY,
Chief Justice.

47 *Affidavit in Opposition to Motion Filed April 23, 1921, to Dismiss Above-entitled Cause.*

Filed April 29, 1921.

* * * * * * *

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, a notary public in and for the District of Columbia, Edward S. Bailey, who, being first duly sworn, deposes and says that he is one of the counsel of record for the petitioner in the above-entitled cause. Affiant says:

(*a*) That the record shows that on January 11, 1921, the United States attorney entered his appearance for the then defendant, Newton D. Baker, Secretary of War, and that at the hearing on the demurrer to the answer of the then said defendant, L. H. Vandoren, Esq., an assistant United States attorney, representing the said United States Attorney Frederick M. Brown, colonel, judge advocate, United States Army, and W. A. Graham, lieutenant colonel, judge advocate, United States Army, appeared and argued the cause on behalf of the said Newton D. Baker.

(*b*) On, to wit, the 10th day of March, 1921, affiant presented an order to substitute respondent, John W. Weeks, Secretary of War, in lieu of Newton D. Baker, whose term of office had expired as such Secretary, as party defendant, to the said L. H. Vandoren, Esq., the assistant United States attorney having charge of the case in the office of the United States attorney, who noted upon said order of substitution his consent thereto; and that thereupon affiant in open court presented the said order to Mr. Chief Justice McCoy, who signed the same on the said 10th day of March, 1921, substituting the said John W. Weeks, the Secretary of War, as party defendant in lieu of the said Newton D. Baker.

(*c*) On the 12th day of March, 1921, the demurrer to the answer filed by the said Baker was sustained by the court.

(*d*) On the 14th day of March, 1921, affiant presented to Mr. Chief Justice McCoy, in open court, an order asking the court to issue the writ of mandamus in said cause, and the said Frederick M. Brown, colonel, judge advocate, appeared and, purporting to represent the respondent, opposed generally the issuance of said writ of mandamus.

(*e*) Thereafter, to wit, before the 18th day of March, 1921, the said Frederick M. Brown, colonel, judge advocate, purporting to represent

the respondent John W. Weeks, generally filed with the court a printed brief upon the questions involved in this cause; on the title-page of said brief appear the names of John E. Laskey, United States attorney; Frederick M. Brown, colonel, judge advocate, United States Army; Lucien H. Vandoren, assistant United States attorney;
48 W. A. Graham, lieutenant colonel, judge advocate, United States Army; and Archibald King, major, judge advocate, United States Army, as counsel.

(*f*) On the 18th day of March, 1921, the said Frederick M. Brown, purporting to represent as counsel the said respondent, John W. Weeks, presented a motion to the court asking for a rule to show cause to the court, and secured from the court a rule directing the petitioner herein to show cause why the memorandum decision of the court made in said cause on March 12, 1921, should not be revoked and annulled, and why reconsideration of all the issues in said cause should not be had, and why petitioner's demurrer to the answer should not be overruled, and why the petition should not be dismissed; copies of said motion and rule to show cause are hereto attached and made a part hereof.

(*g*) About the 1st day of April, 1921, the said Frederick M. Brown, purporting to represent generally the respondent, John W. Weeks, Secretary of War, as counsel, presented a motion to Mr. Chief Justice McCoy, a copy of which is hereto attached, which said motion was argued by the said Frederick M. Brown on behalf of the said John W. Weeks before Mr. Chief Justice McCoy, and the said L. H. Vandoren, W. A. Graham, and Archibald King were present, with the said Frederick M. Brown, at the argument thereof; and on the 12th day of April, 1921, the said Frederick M. Brown filed a memorandum of authorities with Mr. Chief Justice McCoy in support of said motion, which said memorandum applied also to a similar motion in the French case.

Affiant further says that notwithstanding the said order substituting the said John W. Weeks as defendant herein and the said general appearance by the said Frederick M. Brown, colonel, judge advocate, on behalf of the respondent, John W. Weeks, and the initiating by him of the motions or proceedings as aforesaid as counsel for and on behalf of the said John W. Weeks, and the occupying of the time and attention of the court in the presentation and argument of the said motions and proceedings, purporting as aforesaid to represent as counsel generally the said respondent, John W. Weeks, Secretary of War, the said Frederick M. Brown nevertheless on April 20, 1921, undertook to enter a special appearance for the respondent and to move the court for leave to file an answer for and on behalf of the said John W. Weeks, which said motion was denied. Nothwithstanding all of the foregoing, the said Frederick M. Brown, on the 23d day of April, 1921, purporting to appear specially for the said defendant, the Secretary of War, signed and filed in this court an instrument in writing moving the court to pass an order
49 "dismissing this action by reason of petitioner's failure to apply for or cause the service of any process or order upon the

substituted defendant," and claiming that the said John W. Weeks, Secretary of War, is not a party to this cause.

Affiant further says that the record of the court and the papers filed in this cause show that on April 25, 1921, said Frederick M. Brown presented an oral motion to Mr. Chief Justice McCoy asking the court to issue a rule directing that petitioner show cause why the substituted defendant should not have the leave to file such answer herein as referred to in the affidavit made by the said Frederick M. Brown attached to the proposed rule to show cause, copies of which are hereto attached and made a part hereof. The record shows that this oral motion was denied.

EDWARD S. BAILEY.

Subscribed and sworn to before me this 28th day of April, 1921.

[SEAL.] T. C. MEIDINGER,
Notary Public.

In the Supreme Court of the District of Columbia.

At Law.

No. 64936.

THE UNITED STATES OF AMERICA, ex Relatione WILLIAM F. CREARY, Petitioner,

v.

JOHN W. WEEKS, Secretary of War, Respondent.

On motion of Frederick M. Brown, of counsel for respondent, it is

Ordered, That the petitioner herein show cause before this court on the 21st day of March, 1921, at ten o'clock in the forenoon of that day, why the memorandum decision made herein March 12, 1921, should not be revoked and annulled and why reconsideration of all the issues herein should not be had and why petitioner's demurrer to the answer herein should not be overruled and why the petition herein should not be dismissed. And it is

Further ordered, That service of a copy of this rule, if made on petitioner's attorneys on or before the 19th day of March, 1921, shall be sufficient.

WALTER I. McCOY,
Chief Justice Supreme Court.

Washington, March 18, 1921.

50 In the Supreme Court of the District of Columbia.

At Law.

No. 64936.

UNITED STATES OF AMERICA, ex Rel. WILLIAM F. CREARY, Petitioner,

v.

JOHN W. WEEKS, Secretary of War, Respondent.

The demurrer to the answer herein having been argued and submitted and due consideration having been had, it is ordered that the said demurrer be, and the same hereby is, sustained with leave to respondent, within ten days after date hereof, to amend said answer or to file an amended answer herein.

——— ———,
Chief Justice Supreme Court.

Washington, March, 1921.

In the Supreme Court of the District of Columbia.

At Law.

No. 64936.

UNITED STATES OF AMERICA, ex Relatione WM. F. CREARY, Petitioner,

v.

JOHN W. WEEKS, Secretary of War, Respondent.

On reading and filing the annexed affidavit of Frederick M. Brown, verified the 23d day of April, 1921, it is

Ordered, That petitioner shows cause before me in open court on the 29th day of April, 1921, why the substituted defendant should not have leave to file such answer herein as is referred to in said affidavit, or such other answer or amended answer as the interests of justice require. And it is further ordered that neither the procuring of this order nor the argument and submission of the questions aforesaid shall be deemed to constitute a general appearance of the substituted defendant or a waiver of the special appearance under which said defendant has notice for hearing and intends to submit for determination a motion to dismiss the petition for want of jurisdiction of the person of the party defendant; provided, nevertheless, that nothing in this order contained shall be deemed to affect the petitioner's right to cause the continued pendency of this application for leave to file a new answer after a decision denying said motion to dismiss, or the filing of a new answer if such leave be

granted, to be held and treated by the court as a general appearance and hearing, in case the petitioner has such right under the law and according to the principles of justice. And it is further or-
51 dered that service of a copy of this order upon the attorneys for the petitioner, if made on or before the — day of April, 1921, shall be sufficient.

——— ———,
Chief Justice Supreme Court.

In the Supreme Court of the District of Columbia.

At Law.

No. 64936.

UNITED STATES OF AMERICA, ex Relatione WM. F. CREARY, Petitioner,

v.

JOHN W. WEEKS, Secretary of War, Defendant.

Frederick M. Brown, being duly sworn, deposes and says, as follows:

1. By direction of John W. Weeks, the substituted defendant herein, I have to-day filed in the office of the clerk of this court a motion to dismiss the petition herein by reason of failure to obtain jurisdiction of the person of the substituted party defendant appearing specially for the purpose of said motion; and I have caused notice of hearing of said motion for April 29, 1921, to be served on petitioner's attorneys.

2. Subsequent to the filing of said motion, I have been directed by the substituted defendant herein that if said motion to dismiss shall be denied on the ground that, in the view taken by the court, it already has jurisdiction of the person of the substituted party defendant, a motion or application shall be made for an order granting leave to file the answer, a copy whereof was annexed to the motion made and decided herein April 22, 1921, except that a first page, a copy whereof is hereto annexed, is to be substituted for the first page of the above-mentioned answer. And for the purpose of making said last-mentioned motion or application, I have been authorized to enter, immediately after the denying of the motion to dismiss on the ground aforesaid, if said motion shall in fact be denied, such appearance as shall be necessary to enable the motion of application aforesaid for leave to file a new answer or an amended answer to be heard and determined on the merits; including a general appearance on behalf of the substituted party defendant in case the court refuses to hear and determine said motion otherwise.

3. The new answer which is desired to be filed has been read over in my presence by Newton D. Baker, the original defendant herein,

and he expressed to me his approval thereof in substance and
52 form, and as to the correctness and accuracy of the allegations of fact contained in it.

4. I desire to obtain an order granting leave to file a new answer in accordance with the authority and directions aforesaid. Great confusion and embarrassment have, however, resulted to the War Department and to the Army owing to the pendency of this action. By reason of this action, all promotions of commissioned officers in the Army in the grade of colonel and in grades inferior thereto are being delayed, hampered, and limited, if not entirely prevented. In order to diminish as much as possible the duration of the pendency of this litigation, I desire that argument upon both the questions aforesaid (in so far as farther argument is asked for or permitted) shall be at the same time, to wit, on April 29, 1921, the next motion day.

5. In order to make it clear that the substituted defendant insists upon his special appearance until after his motion to dismiss shall be denied (if indeed, it shall be denied), I feel that an order to show cause of the nature hereof submitted is necessary.

FREDERICK M. BROWN.

Sworn to before me this, the 23d day of April, 1921.

M. CURTIS LAMMOND,
Notary Public.

Supreme Court of the District of Columbia.

Friday, April 29, 1921.

Session resumed pursuant to adjournment, Mr. Chief Justice McCoy, presiding.

* * * * * * *

Upon consideration of the motion of respondent filed herein April 23, 1921, to dismiss this action, it is ordered that said motion be, and it is hereby, overruled.

This cause coming on to be heard upon the petition, the answer and demurrer thereto, and after argument of counsel, and the cause being submitted to and considered by the court, and the court having sustained the demurrer on the 12th day of March, A. D. 1921, it is by the court this 29th day of April, 1921,

Ordered, That the writ of mandamus forthwith issue against John W. Weeks, Secretary of War of the United States, as prayed for in the petition herein, commanding him to vacate and set aside the order dated the 17th day of November, 1920, purporting to discharge the relator, William F. Creary, from the Army of the United States, and restore the said relator, William F. Creary, to the
53 office and status of colonel of Infantry in the Army of the United States, as of the 17th day of November, 1920, the

date of the said order purporting to discharge him from said office and from the Army of the United States, and to the rights incident and belonging to said office and status of which he was deprived by said order.

From the foregoing order the respondent by his attorney in open court notes an appeal to the Court of Appeals of the District of Columbia.

Motion to Correct Record and to Vacate Final Judgment.

Filed May 3, 1921.

* * * * * * *

Now comes John W. Weeks, making such appearance herein as this motion justly implies, and upon the affidavit of Frederick M. Brown, verified May 3, 1921, hereto annexed and marked "Exhibit A," and upon the other papers hereto annexed, which papers are mentioned and described in paragraphs 2 and 6 of said affidavit and marked "Exhibits B," "C," "D," "E," "F," "G," and "H," respectively, and upon all the papers and proceedings herein, moves this court for an order or for orders granting defendant relief as follows:

1. That the records of this court be amended, supplemented, and corrected so as to show the true nature of its proceedings in that on the 22nd day of April, 1921, this court found, concluded, and decided that the defendant had not submitted to the jurisdiction of this court, and in that on the 29th day of April, 1921, and before the signing of the final judgment herein defendant applied for leave to file a motion granting him permission to interpose an answer, which said motion and answer are set forth and described in Exhibit B, hereto annexed, and defendant offered to appear generally and to submit to the jurisdiction of the court in order to secure consideration of said motion, and defendant applied for the immediate consideration of said motion.

2. That the final judgment or order herein be vacated and that leave be granted to defendant to interpose the answer mentioned and described in Exhibit B, hereto annexed.

3. That the final judgment or order herein be vacated, and that this action be dismissed unless within a time to be fixed by the court petitioner shall cause due process, order, or rule to be served upon the substituted defendant so as to subject him to the jurisdiction of the court.

Washington, May 3, 1921.

JOHN E. LASKEY,
United States Attorney.
FREDERICK M. BROWN,
Colonel, Judge Advocate, U. S. A.

54 EXHIBIT A.

DISTRICT OF COLUMBIA, *ss:*

Frederick M. Brown, being duly sworn, deposes and says as follows:

1. On the 23rd day of April, 1921, I filed herein as attorney for the defendant, under a special appearance, a motion to dismiss the action for want of jurisdiction of the person of the party defendant, which said motion was argued and denied April 29, 1921.

2. In open court on the 29th of April, 1921, before submitting the motion aforesaid, I presented to the court the motion hereto annexed, marked "Exhibit B"; the two affidavits hereto annexed, marked "Exhibits C" and "D," respectively; a copy of the letter of authority hereto annexed, marked "Exhibit E"; a copy of the proposed first page of a new answer herein hereto annexed, marked "Exhibit F"; and the proposed notice of hearing hereto annexed, marked "Exhibit G." And at the same time I made oral application to the court to be permitted to file the same *tunc pro nunc* as of the time of the court's decision upon the motion to dismiss. The permission thus sought was not granted, the court stating that the application would be considered after the argument and decision of the pending motion.

3. On said 29th day of April, 1921, in the court room and prior to the opening of court, I presented to Col. Edward S. Bailey a copy of the papers mentioned in paragraph 2 hereof, stating that they were papers supporting a motion herein intended to be effective the instant that a ruling upon the motion to dismiss should be made, and I asked Col. Bailey to accept the papers upon the understanding that my serving them was not to prejudice my contention, upon the pending motion to dismiss, that my appearance for the defendant was special and not general. Col. Bailey refused to accept the papers upon this understanding and they were not left with him.

4. After the conclusion of the argument upon the motion to dismiss and immediately upon the court's oral announcement of its decision to deny the motion to dismiss, I orally renewed my application for leave to file the papers referred to in paragraph 2 hereof, to wit, Exhibits B, C, D, E, F, and G, and I asked the court to grant an immediate hearing of the motion expressed in Exhibit B, stating that defendant would appear generally for that purpose if necessary. No distinct ruling upon said oral application was made by the court, except that the court shortly afterward signed a paper stated by the court to be the final judgment or order asked for and presented by the petitioner.

55 5. Before the final judgment or order was signed as aforesaid, I requested the clerk to make a minute upon the records of this court showing the making of the applications referred to in paragraphs 2 and 4 hereof and the rulings thereon. I am informed

and believe that such minute has not been made. I desire, and I conceive the defendant to be entitled to, an order requiring that the facts stated in paragraphs 2 and 4 hereof to appear upon the records of this court. In my opinion said facts are material with reference to further proceedings herein in this court or in the appellate court or courts.

6. I have endeavored to cure the imperfections aforesaid in the records of this court by ex parte order. To that end, I drew on the 29th of April, 1921, the order hereto annexed and marked "Exhibit H." My endeavor to present said order to his honor, Chief Justice McCoy, on said day or to leave it with his secretary failed. The following day I was not accorded an interview with Chief Justice McCoy, but I left said order with his secretary. On Monday, May 2, 1921, Chief Justice McCoy informed me that he would not sign the order ex parte, but that I must notice a motion for said order or for a similar order in due course under the rules and practice.

7. In the course of the argument aforesaid on the 29th of April, 1921, Col. Edward S. Bailey read from a certain affidavit herein, said to have been verified by him on the 28th day of April, 1921. In certain respects, the assertions made therein are inaccurate, the truth in respect thereto being as follows:

(*a*) I attended in court on the 14th day of March, 1921, in response to a request from petitioner's attorneys which had been communicated to me by Major King, J. A., only a few minutes previously. Prior to leaving for court it had been impossible for me to speak to the Acting Judge Advocate General or to the Secretary of War. In court I explained this fact, and I disavowed authority to speak for anyone or to represent the defendant generally or otherwise.

(*b*) In all acts done by me thereafter and until April 21, 1921, I acted and purported to act as counsel on behalf of the United States attorney, who purported to be acting as attorney for the defendant. All of my acts were performed under his instructions and received his approval. From the time of my learning of the order of substitution, which was entered herein March 10, 1921, until April 12, 1921, or thereabouts, I suppose that the United States attorney had full authority to represent the substituted defendant for all purposes herein. On or about April 12, 1921, I learned that his only authority to do so was that which he deemed to be implied in law without actual retainer or instructions from the defendant.

56 (*c*) In respect of my acts as counsel under instructions of the United States attorney, I did not purport to represent, or to make appearance for the defendant generally. While not conceding that those acts in legal intendment and effect amount to a general appearance in any event, I assert that they cannot have that effect in this case because defendant did not authorize a general appearance for him to be made at that time. Otherwise I have only acted or purported to act for the substituted defendant specially in con-

formity with his instructions to me, which instructions are set forth in the affidavit of John W. Weeks, verified April 16, 1921, and in my affidavit, verified April 23, 1921, both of which are on file herein.

8. That up to and including April 22, 1921, the substituted defendant had not appeared generally herein was expressed adjudicated by the court; for the court on said April 22, 1921, denied defendant's motion for leave to file the answer annexed to said motion on the express ground, stated in open court, that said motion could not be granted or considered because defendant had not submitted to the jurisdiction of the court and was only appearing specially. I am informed and believe that the records of this court are defective in failing to disclose the fact that an adjudication as to the nature of defendant's appearance was made April 22, 1921.

9. The decision made by the court April 29, 1921, to deny the motion to dismiss must, it would seem, have been based upon the theory that at that time the substituted defendant had submitted to the jurisdiction of this court. And yet there had been no act by defendant or any one else in the interval between April 22 and April 29, 1921, which, under any possible legal argument, could amount to a general appearance or to a submission to the jurisdiction of the court.

FREDERICK M. BROWN.

Sworn to before me this the third day of May, 1921.
[SEAL.] N. CURTIS LAMMOND,
Notary Public.

EXHIBIT B.

* * * * * * *

The motion of John W. Weeks, named herein as defendant, for an order dismissing the petition by reason of want of jurisdiction of the person of the party defendant having been denied and the court having ruled that it has jurisdiction of the person of the party defendant, now comes said John W. Weeks and moves this court, upon his affidavit herein, verified the 29th day of April, 1921, and hereto annexed, and upon his affidavit herein verified the 16th day of April, 1921, and annexed to and included in the papers upon
57 which the motion herein was made and determined April 22, 1921; and upon the affidavit of Edward A. Kreger, verified the 29th day of April, 1921; and upon the affidavit of Frederick M. Brown, verified April 23, 1921, and filed April 23, 1921, in the office of the clerk of this court; and upon all the papers and proceedings herein, for an order permitting defendant to file herein an answer, a copy whereof was included in the papers upon which the motion aforesaid was made and determined April 22, 1921, except that the defendant desires leave to substitute the page, a copy whereof is hereto annexed, instead of the first page of said proposed answer on which the motion was made April 22, 1921; and for the purpose of the submission of the present motion the defendant, not limiting

his appearance to the special appearance heretofore entered, makes such general or other appearance as is properly implied in said submission or as the court may rule to be necessary to that end.

JOHN E. LASKEY,
United States Attorney.
FREDERICK M. BROWN,
Colonel, Judge Advocate, U. S. A.

EXHIBIT C.

* * * * * * *

John W. Weeks, being duly sworn, deposes and says that he has conferred authority upon Col. E. A. Kreger, U. S. A., Acting Judge Advocate General of the Army, to cause a general appearance to be entered herein on his behalf in accordance with and subject to the terms and conditions specified in a certain letter of authority dated the 29th day of April, 1921, a copy whereof is hereto annexed and made a part of this affidavit. Deponent further says that, except for the authority conferred upon Colonel Frederick M. Brown, as set forth in deponent's affidavit verified the 16th of April, 1921, and in the affidavit of Frederick M. Brown verified the 23rd of April, 1921, and as herein set forth, deponent has at no time authorized any one to appear for him or to represent him in this action.

JOHN W. WEEKS.

Sworn to before me this the 29th day of April, 1921.
[SEAL.] N. CURTIS LAMMOND,
Notary Public.

EXHIBIT D.

* * * * * * *

Edward A. Kreger, being duly sworn, deposes and says that he is the Acting Judge Advocate General of the United States
58 Army and that pursuant to the power and authority conferred April 29, 1921, upon him by the Secretary of War, he has empowered and requested John E. Laskey, U. S. attorney, to make such appearance (other than the appearance already made herein by Frederick M. Brown) as is described in, and as may prove necessary to enable consideration of, the foregoing motion to be had on the merits, and deponent has directed said Frederick M. Brown to support said motion as special attorney for the defendant and also (to the extent that is acceptable to the U. S. attorney) as counsel for the defendant upon any broad appearance made by the U. S. attorney.

EDWARD A. KREGER.

Sworn to before me this the 29th day of April, 1921.
[SEAL.] N. CURTIS LAMMOND,
Notary Public.

EXHIBIT E.

April 29, 1921.

Colonel E. A. Kreger,
Acting Judge Advocate General, U. S. A.:

DEAR SIR:

In the mandamus actions instituted by Colonel William F. Creary and by Colonel John W. French in the Supreme Court of the District of Columbia (actions at law, numbers 64936 and 65058) you are hereby authorized to enter, or to cause to be entered by the U. S. attorney or by anyone else selected by you, my general appearance immediately upon the court's determining that it has acquired jurisdiction over me therein or at such other time as you may deem just and proper; and if the court shall decide in favor of its jurisdiction over me, you are hereby authorized to waive any further objection to the jurisdiction of the court or to reserve objection to such jurisdiction, notwithstanding your entering a general appearance on my behalf, whichever of those courses shall seem to you to be just and proper.

Yours truly,

JOHN W. WEEKS,
Secretary of War.

EXHIBIT F.

* * * * * * *

Answer of Defendant, John W. Weeks, Secretary of War, to Petition for Mandamus and to Rule to Show Cause.

John W. Weeks, Secretary of War, now and at all times saving and reserving unto himself all exceptions to the imperfec-
59 tions, uncertainties, and defects in the petition for writ of mandamus filed herein, and reserving unto himself the benefit of the lack of jurisdiction of the court appearing on the face of said petition to grant the relief prayed for, and the lack of jurisdiction of the court of and over the person of the above-named party defendant herein and also the lack of jurisdiction of the court to direct him, as Secretary of War, to perform the act in question, and relying on the same for all purposes and also in like manner as if demurrer had been specifically interposed, for answer to said petition, or so much thereof as is material, and to said rule to show cause, says on information and belief as follows:

1. Defendant admits that the allegations contained in the first paragraph of the petition were true at the time of the filing thereof.

2. As to the matters alleged in the second paragraph of the petition, defendant admits the making of findings of moral, professional, and physical fitness upon which petitioner was appointed and commissioned first lieutenant, captain, major, and lieutenant colonel

of Infantry, respectively; but defendant denies the materiality of the allegation that such findings or any of them were duly or correctly made and denies any knowledge or information as to the truth and fact in that regard. Defendant alleges that the present standard of professional fitness to qualify an officer to become or to

(1)

EXHIBIT G.

* * * * * * *

Messrs. Ansell & Bailey,
Attorneys for Petitioner:

Please take notice that in case pending motion to dismiss for want of jurisdiction of the person of the party defendant is denied this motion will be filed and brought on for hearing for the first motion day thereafter or for the first opportunity for hearing granted by the court in case earlier opportunity may be so granted.

FREDERICK M. BROWN,
Colonel, Judge Advocate, U. S. A.
JOHN E. LASKEY,
United States Attorney.

EXHIBIT H.

* * * * * * *

The defendant having in open court on the 29th day of April, 1921, before submitting his motion to dismiss asked leave to
60 to file the annexed motion and motion papers as of the time of the decision of said motion to dismiss, and having renewed said request upon the announcing of the court's decision denying said motion to dismiss, and having asked thereupon for immediate consideration of the annexed motion, and the court having granted leave to file in the clerk's office said last-mentioned motion and motion papers and having denied said application for immediate consideration thereof, and having directed final judgment for the petitioner to be entered forthwith, now it is by the court this the 30th day of April, 1921,

Ordered, That said motion and motion papers hereto annexed be filed nunc pro tunc as of April 29, 1921, immediately prior to the entry of final judgment herein, and it is

Further ordered, That said motion be denied.

____ ____,
Chief Justice Supreme Court.

In the Supreme Court of the District of Columbia.

* * * * * * *

Take notice that the aforegoing motion, dated this day, will be for hearing on the 6th day of May, 1921, at 10 a. m., before his honor, Chief Justice McCoy.

JOHN E. LASKEY,
United States Attorney.
FREDERICK M. BROWN,
Colonel, Judge Advocate, U. S. A.

Washington, May 3, 1921.

Memorandum.

June 16, 1921.

Time for filing transcript of record extended to and including July 12, 1921.

Assignment of Errors.

Filed July 1, 1921.

* * * * * * *

John W. Weeks, named as the substituted defendant herein, hereby assigns error in the final order or judgment of the Supreme Court of the District of Columbia signed and entered on the 29th day of April, 1921, in the following particulars:

First. For that the court awarded and directed the issuing of a peremptory writ of mandamus commanding the said defendant to vacate a certain War Department order made November 17, 1920, by, or by the authority of, his predecessor in the office of Secretary of War, which order discharged the relator from the Army,
61 and commanding the said defendant to induct the relator into the office of colonel of Infantry in the Army.

Second. For that the court refused to dismiss the petition for failure to state a good cause of action.

Third. For that the court held and decided that the answer filed by Newton D. Baker, the original defendant herein, to the petition was insufficient to constitute a defense to the petition.

Fourth. For that the court sustained relator's demurrer to the answer of said Newton D. Baker and refused to permit proof to be made in respect of the issues of fact raised by the petition and by the said answer.

Fifth. For that the court held and decided that the action taken in any case by the final classification board under section 24*b* of the

act of June 4, 1920 (41 Stat., 759, 773), commonly called the Army reorganization act, is ineffective unless actually reviewed through the personal and individual consideration of the President; and for that the court refused to hold that the action of said board is effective and binding unless the President see fit to intervene by way of ordering a revision of its action.

Sixth. For that the court held and decided that an Army officer who has been classified in class B under the terms of the section aforesaid is entitled to notice and hearing before the board to determine the cause of classification; and for that it held that such an officer is entitled to a hearing upon the question of the cause of his classification; and for that the court refused to hold that an officer who has had a hearing before a court of inquiry preliminary to his final classification has had such a hearing upon the question of the cause of classification as the law requires.

Seventh. For that the court, in awarding mandamus in this case, violated the rule that mandamus is not the proper remedy to cure the effect of an improper executive act not enjoined upon the defendant official by law or to cure the effect of one involving judgment or discretion, the acts of the Secretary of War in this case being not only not enjoined upon him by law, but also involving judgment and discretion.

Eighth. For that the court, in awarding mandamus in this case, violated the rule that mandamus is not the proper remedy if the relator has another adequate remedy; relator's only justiciable, ultimate right in this case (if any right exists) being a right to compensation and his only intermediate rights (if any such rights exist) being a right to have the final classification board submit his case to the President for personal attention and consideration by the President and a right to be granted a hearing by the board to determine
cause of classification, the rights aforesaid being enforceable
62 by action in the Court of Claims and by mandamus against the members of said boards, respectively.

Ninth. For that the court, in awarding mandamus in this case, violated the rule that mandamus is not the proper remedy where no substantial injustice to relator is shown or where the alleged wrong suffered by the relator falls short of being clear and indisputable; the fact being in this case that the relator has, by his demurrer, admitted that he has not always rendered efficient service to the Army and has at times been guilty of neglect of duty, misconduct, or disqualifying habits and the relator's right to redress, if any there be, is of a very doubtful nature owing, among other things, to uncertainties and ambiguities in the statute involved, a statute not previously interpreted by the courts.

Tenth. For that the court refused to hold that it is entirely optional with the President whether or not he considers cases arising under section 24*b* aforesaid and that it is entirely optional with him

whether or not the fact of the pendency of such cases shall be brought to his notice.

Eleventh. For that the court refused to hold that any action necessary or appropriate to be taken in cases arising under said section 24*b* by the President or under presidential authority may properly and effectively be delegated by him to the Secretary of War and, in particular, that the court refused to hold that the President may properly and effectively delegate to the Secretary of War the duty of determining which of said cases merit the time and personal consideration of the President and which cases do not.

Twelfth. For that, after dismissing Newton D. Baker as a party defendant herein, and naming John W. Weeks as the substituted party defendant by order made and entered herein March 10, 1921, the court took any proceeding until after its process or some appropriate notice should have been served upon said John W. Weeks or until after he should have appeared generally herein; and in particular for that the court entered final judgment or order herein and awarded a peremptory writ of mandamus against said John W. Weeks without any such process, notice, or appearance.

Thirteenth. For that the court at no time had jurisdiction of the person of the said John W. Weeks; and for that the court has neglected and omitted to cause process or notice to be served on said John W. Weeks so as to acquire jurisdiction of his person; and for that the court has held and decided that it has acquired jurisdiction over John W. Weeks by general appearance; and for that the court refused to dismiss the action for want of jurisdiction upon motion to that end duly filed April 23, 1921, and submitted April 29, 1921, under a special appearance.

63 Fourteenth. For that the court by its writ of mandamus assumed to command the performance by the substituted defendant of two acts which are for him perfectly impossible, to wit, investing relator, who has ceased to be an Army officer, with the office of colonel, an act within the competency of the President and Senate alone, and creating for relator the office of colonel formerly held by him without nomination or confirmation, which office, irrespective of the validity or invalidity of the order discharging him from the Army, expired March 4, 1921, with the end of the session of the Senate of the United States, in virtue of article 2, section 2, clause 3, of the Constitution.

Fifteenth. For that the court has denied to the defendants, or any of them, an opportunity of showing by amended or supplemental answer, the facts which, since the filing January 25, 1921, of the answer of Newton D. Baker, having become material owing to the end of the session of the Senate, March 4, 1921.

Sixteenth. For that the court refused to consider on its merits the motion of John W. Weeks filed April 20, 1921, and submitted April 22, 1921, for leave to interpose an answer of his own, a copy of which intended answer was submitted with the motion, notwithstanding the

fact that said John W. Weeks formally offered to appear generally as a condition to the desired leave being granted and notwithstanding the fact that the court has subsequently ruled that his acts prior to April 22, 1921, constituted a general appearance.

Seventeenth. For that the court has denied to John W. Weeks the right to a due hearing, since due hearing can not be had without opportunity to plead.

Eighteenth. For that the court on the 25th day of April, 1921, refused to grant a rule to show cause of such nature that, if granted, an opportunity would have been afforded to said John W. Weeks on the 29th day of April, 1921, or, at all events, before final judgment, of submitting his motion for leave to interpose his own answer on any terms exacted by the court, but without waiving his right to a decision upon his contention that the court had not yet acquired jurisdiction over his person.

Nineteenth. For that the court entered final judgment herein immediately after overruling the motion to dismiss for want of jurisdiction and without affording opportunity to submit the motion of John W. Weeks for leave to interpose an answer to his own or to amend the answer of Newton D. Baker, notwithstanding urgent requests on behalf of said John W. Weeks to be afforded such opportunity and notwithstanding his offer to enter any appearance necessary to enable a motion to that end to be considered on its merits.

64 Twentieth. For that the court refused to direct that the minutes of the court should record the requests and offer which were made, as aforesaid, before final judgment.

Twenty-first. For that the court overruled the motion filed May 3, 1921, and submitted May 23, 1921, or any part thereof.

JOHN E. LASKEY,
Attorney of the United States in and
for the District of Columbia,
Attorney for Respondent.

Designation of Record.

Filed July 1, 1921.

* * * * * * *

In preparing the record on appeal in the above-entitled cause, the clerk will please include

1. All docket entries relating to this case.

2. All minute entries relating to this case: especially those (*a*) of March 10, 1921, appearing at page 293 of volume 70 of minutes; (*b*) of March 12, appearing at page 298 thereof; (*c*) of March 18, appearing at page 315 thereof; (*d*) of March 21, appearing at page

317 thereof (*e*) of April 22, appearing at page 360 thereof; (*f*) of April 29, appearing at page 371 thereof; (*g*) of May 27, appearing at page 397 thereof; and (*h*) of June 16, appearing at page 431 thereof.

3. Petition for writ of mandamus.

4. Rule of January 3, 1921, ordering Newton D. Baker to show cause.

5. Answer of Newton D. Baker to petition, with six exhibits annexed to said answer.

6. Relator's demurrer to answer of Newton D. Baker.

7. Order of substitution entered March 10, 1921.

8. Memorandum of decision of court sustaining demurrer, filed March 12, 1921.

9. Rule to show cause granted March 18, 1921.

10. Relator's answer to rule.

11. Opinion of court, filed March 26, 1921.

12. Motion for leave to amend answer or to file amended answer, which was argued April 1, 1921, and decided April 11, 1921.

13. Memorandum of the decision of the court, made and filed April 11, 1921, in respect of the motion argued April 1, 1921.

14. Motion filed April 20, 1921, with affidavit of John W. Weeks, verified April 16, 1921, and copy of proposed answer verified April 16, 1921, in support of said motion.

65 15. Memorandum of the decision of the court made April 22, 1921, upon said motion; which memorandum was filed May 23, 1921.

16. Proposed rule to show cause returnable April 29, 1921, which was presented ex parte April 23, 1921, and was refused April 25, 1921, and filed the same day; together with affidavit of Frederick M. Brown, verified April 23, 1921, in support of rule, with autograph memorandum of refusal by Chief Justice McCoy and with note stating that first page of proposed answer referred to in motion is the same as Exhibit F annexed to motion filed May 3, 1921, and submitted May 23, 1921.

17. Motion to dismiss filed April 23, 1921, and submitted April 29, 1921.

18. Affidavit of Edward S. Bailey read April 29, 1921, in opposition to motion to dismiss filed April 23, 1921.

19. Final order or judgment entered April 29, 1921.

20. Motion filed May 3, 1921, and submitted May 23, 1921; together with papers annexed thereto, to wit, Exhibits A, B, C, D, E, F, G, and H.

21. Memorandum of decision of court made May 27, 1921, upon motion filed May 3, 1921.

22. Assignment of errors.

23. This designation.

JOHN E. LASKEY,
Attorney of the United States in and for the District of Columbia, Attorney for Respondent.

Service of copy of above upon us June 25, 1921.
ANSELL & BAILEY,
Attorneys for Petitioner.

Memorandum.

July 8, 1921.—Time for filing transcript of record extended to and including August 1, 1921.

66 Supreme Court of the District of Columbia.

No.	Parties.	Action.	
64936.	The United States of America, ex relatione William F. Creary, vs. John W. Weeks, Secretary of War.	Mandamus.	Plaintiff's attorney, Ansell & Bailey. Defendant's attorney, U. S. Atty.

Date judgment.	Proceedings.	
1921, Jany. 3.	Petition & appearance, order to file.	Filed.
" " "	Respondent ordered to show cause on Jany. 2, 1921, why writ should not issue (M. 70, p. 201).	
" " "	Rule to show cause & 1 copy issued.	
" " 11.	Appearance U. S. attorney for defdt. Order.	Filed.
" " 25.	Answer of respondent & exhibits (6).	"
" " 31.	Demurrer to answer of respondent.	"
" Mch. 10.	John W. Weeks, Secy. of War, substituted as respt. (M. 70, p. 293.)	
" " 12.	Demurrer to answer sustained (M. 70, p. 298).	
" " 12.	Opinion. Filed.	
" " 18.	Rule to show cause (M. 70, p. 315).	
" " 21.	Answer of relator to rule.	Filed.
" " "	Oral motion of respdt. to revoke and annul the memo. decision of Mar. 12, & reconsider all issues, to overrule petitioner's demurrer to respdt's. answer & dismiss petition, overruled without prejudice (M. 70, p. 317).	
" " 26.	Opinion of court.	Filed.
" Apr. 11.	Memo. of court.	"

Date judgment.	Proceedings.	
1921, Apr. 20.	Appearance, special of Defdt. Weeks by Fredk. M. Brown. Mo. for leave to file answer, affidavit, proposed answer and affidavit.	"
" " 22.	Mo. for leave to file amended answer denied (M. 70, p. 360).	
" " 23.	" of Defdt. Weeks to dismiss cause & notice.	"
" " 25.	Affidavit of atty. for defendant in support of motion for rule to show cause why new answer should not be filed. Copy of proposed rule & endorsement of Chief Justice showing denial of rule.	"
" " 29.	Affidavit in opposition to mo. filed April 23 to dismiss & exhibits (4).	
" " "	Motion to dismiss action overruled (M. 70, p. 371).	
67		
1921, Apr. 29.	Ordered that writ of mandamus issue. Appeal noted by respondent (M. 70, p. 371).	Filed.
" May 3.	Motion of defdt. to correct record, vacate judgment. Exhibits (8) & notice.	"
" " 23.	Memo. of court.	"
" " 27.	Motion to correct record & vacate judgment of April 29, 1921, overruled (M. 70, p. 397).	
" June 16.	Time to file transcript extended to July 12 (M. 70, p. 431).	
" July 1.	Assignment of error.	Filed.
" " "	Designation of record.	"
" " 8.	Time to file transcript extended to August 1, 1921 (M. 70, p. 472).	

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 108, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 64936 at law, wherein The United States of America, ex relatione William F. Creary, is petitioner, and Newton D. Baker is respondent, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 21st day of July, 1921.

[SEAL.] MORGAN H. BEACH,
E. W. *Clerk.*

(Indorsement on cover:) District of Columbia Supreme Court. No. 3693. John W. Weeks, Secretary of War, appellant, vs. The United States of America, ex relatione William F. Creary. Court of Appeals, District of Columbia. Filed July 26, 1921. Henry W. Hodges, clerk.

68 Friday, October 7th, A. D. 1921.

* * * * * * *

No. 3693.

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione WILLIAM F. CREARY

and

No. 3694.

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione JOHN W. FRENCH.

The argument in the above entitled causes was commenced by Mr. L. H. Vandoren, attorney for the appellant.

Monday, October 10th, A. D. 1921.

* * * * * * *

No. 3693.

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione WILLIAM F. CREARY

and

No. 3694.

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione JOHN W. FRENCH.

The argument in the above entitled causes was continued by Messrs. Samuel T. Ansell and Chas. P. Caldwell, attorneys for the appellees, and was concluded by Mr. Frederick M. Brown, attorney for the appellant.

69 In the Court of Appeals of the District of Columbia.

No. 3693.

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

THE UNITED STATES OF AMERICA, ex Relatione WILLIAM F. CREARY, Appellee.

Opinion.

Mr. Justice VAN ORSDEL delivered the opinion of the Court:

Relator Creary filed a petition in the Supreme Court of the District of Columbia for a writ of mandamus to compel respondent, Newton D. Baker, Secretary of War, to vacate an order discharging the relator from the army of the United States and to restore him to the rank of colonel. A rule to show cause was issued. Respondent answered the petition, and the relator demurred to the answer. Later, present respondent, John W. Weeks, Secretary of War, was substituted for Baker. From a judgment for relator, the case comes here on appeal.

The controversy involves the construction of section 24*b* of the National Defense Act of June 4, 1920, 41 Stats. L., 759, 773. The material portions of the section read as follows: Immediately upon the passage of this Act, and in September of 1921 and every year thereafter, the President shall convene a board of not less than five general officers, which shall arrange all officers in two classes, namely: Class A, consisting of officers who should be retained in the service, and Class B, of officers who should not be retained in the service. Until otherwise finally classified, all officers shall be regarded as belonging to Class A, and shall be promoted according to the provisions of this Act to fill any vacancies which may
70 occur prior to such final classification. No officer shall be finally classified in Class B until he shall have been given an opportunity to appear before a court of inquiry. In such court of inquiry he shall be furnished with a full copy of the official records upon which the proposed classification is based and shall be given an opportunity to present testimony in his own behalf. The record of such court of inquiry shall be forwarded to the final classification board for reconsideration of the case, and after such consideration the finding of said classification board shall be final and not subject to further revision except upon the order of the President. Whenever an officer is placed in Class B, a board of not less than three officers shall be convened to determine whether such classification is due to his neglect, misconduct or avoidable habits. If the finding is affirmative, he shall be discharged from the army; if negative, he shall be placed on the unlimited retired list with pay at the rate of 2 1/2 per centum of his active pay multiplied

by the number of complete years of commissioned service, or service which under the provisions of this Act is counted as its equivalent, unless his total commissioned service or equivalent service shall be less than ten years, in which case he shall be honorably discharged with one year's service."

The relator was placed by the classification board in class B, and at his request a court of inquiry was convened, before which he appeared with counsel. Complaint is made that he was not furnished with a full copy of his record in the War Department, but was furnished only with copies of the unfavorable parts of his record. He was, however, permitted to examine all original records in the presence of the court while in session. No objection was interposed by him or his counsel to the proceedings before the court of inquiry; hence, it is too late to raise objection now.

The record of the court of inquiry was then sent to the classification board, which placed relator in class B. Following his final classification, a board of officers (referred to as the
71 "Honest and Faithful Board") was convened, as provided in the act, to determine the cause of such classification. The board held that relator's classification was due to his own neglect, misconduct or avoidable habits, and he was accordingly discharged from the army.

We think the statute is not difficult of construction, since it expressly provides that the record made by the court of inquiry shall be reviewed by the classification board for the purpose of the final determination of the class to which the officer belongs. There is nothing in the statute, however, which provides that the Honest and Faithful Board, convened for the determination of "whether such classification is due to his neglect, misconduct or avoidable habits," shall be confined to the record made before the court of inquiry. The duty of the Final Classification Board is to determine the general classification to which the officer belongs, while the duty imposed upon the Honest and Faithful Board is to ascertain, as a basis for his retirement from the service, whether or not the disqualification resulted from the officer's own misconduct or from causes over which he had no control. Therefore, the record made before the court of inquiry might or might not contain material pertinent to the investigation which the statute imposes upon the Honest and Faithful Board.

Objection is made that relator was not given notice of the hearing before the Honest and Faithful Board or an opportunity afforded him to be heard personally and by counsel in his own defense. It also appears that one member of the board had formerly sat as a member of an administrative board which had classified relator as a "misfit" for the duties which he was then performing. It is, therefore, urged that through lack of notice he was deprived of an opportunity to take exception to the personnel of the board.

But, this contention may be laid aside, since, in our view, the case turns upon a question of jurisdiction. Upon the following order relator was dismissed from the army: "The action of the

classification board in finally classifying Colonel William
72 F. Creary, Infantry, in class B is approved by the President and by his direction, a board of officers having determined that such classification is due to the officer's neglect, misconduct, and avoidable habits, Colonel Creary is discharged from the service under the provisions of section 24*b* of the act of Congress approved June 4, 1920. (Signed) W. R. Williams, Assistant Secretary of War."

It appears that this order was made under authority of a general order of the President authorizing the Secretary of War to take such action in the name of the President as might be necessary in carrying out the provisions of the statute in respect of the classification and retirement or discharge of officers thereunder. The question which at once suggests itself is, whether the authority conferred by the statute upon the President is such that it could be legally delegated to the Secretary of War. It is well settled that where the duty imposed upon the President is judicial in character, it may not be delegated away. Runkle vs. United States, 122 U. S., 543.

In that case, the appeal was from a judgment of the Court of Claims in a suit for longevity pay as an officer in the United States army. The case turned upon the legality of Runkle's discharge from the service, where the President has failed to review the court-martial proceedings. The duty of the President to review court-martial proceedings was the principal question before the court. It was held to be a judicial function expressly imposed by statute, and, as such, could not be delegated away. A court-martial is defined in the opinion of the court as follows: "A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished it is dissolved. * * * Their authority is statutory, and the statute under which they proceed must be followed throughout. The facts necessary to show their jurisdiction and that
73 their sentences were conformable to law must be stated positively; and it is not enough that they may be inferred argumentatively." It follows, therefore, that proceedings in court-martial are judicial in character.

True, in the Runkle case, as here, the order involved the dismissal of an officer from the army. But there the statute expressly provided that no "sentence of a general court-martial, in the time of peace, extending to the loss of life, or the dismission of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States, for his conformation or disapproval, and orders, in the case." The officer was court-martialled for misconduct, convicted, and, as a penalty, dismissed from the service. The proceedings related to the discipline of the army.

Here we are dealing with a general act of Congress for the reorganization of the army, and the proceedings relate to the classification of the officers—those classified in class A to be retained, and

those classified in class B to be retired or dismissed according to the cause of unfitness. The proceedings are purely administrative, and do not partake in any sense of a judicial character. Relator has no property right in the office to which he seeks reinstatement (Taylor and Marshall vs. Beckham, 178 U. S., 548); no contract right is involved (Butler vs. Pennsylvania, 10 How., 402); and the office he held was revocable by the sovereignty at will (Crenshaw vs. United States, 134 U. S., 99). In other words, the relator's rights are measured by the statute. Reaves vs. Ainsworth, 219 U. S., 296; Ex parte Garland, 4 Wall., 333, 378.

The President, as commander-in-chief of the army and navy, is vested with wide administrative and executive power, and, unless the exercise thereof is made judicial by express provision of statute, or is such by clear implication, authority may be given by the President to the proper head of a department to act for him and in his name. The power of the President to delegate authority to the
74 Secretary of War in military affairs is expressed in section 216, R. S., as follows: "The Secretary of War shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to military commissions, the military forces, the warlike stores of the United States, or to other matters respecting military affairs; and he shall conduct the business of the Department in such manner as the President shall direct." This implies authority in the President to impose upon the Secretary of War the administration in his name or by his order of much of the general executive power reposed in him as commander-in-chief of the army. The limitation upon the power of the President to so delegate his authority in administrative military affairs seems to extend only to those cases where he is expressly or by clear implication required by statute to act in his individual official capacity.

Nothing in the present statute relating to the classification of officers imposes a judicial duty upon the President to review the findings of the final classification board or personally to issue the order of approval or disapproval. The duty is purely executive, and can be performed lawfully by the Secretary of War. As was said in the Runkle case: "There can be no doubt that the President, in the exercise of his executive power under the Constitution, may act through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. That has been many times decided by this court. Wilcox vs. Jackson, 13 Pet., 498, 513; United States vs. Eliason, 16 Pet., 291, 302; Confiscation Cases, 20 Wall., 92, 109; United States vs. Farden, 99 U. S., 10, 19; Wolsey vs. Chapman, 101 U. S., 755, 769."

The President may, of course, perform this function personally, or, as in this instance, he may delegate it to the Secretary of
75 War. But, in either case, it is an administrative order of the President, and, as such, must be vacated as a condition precedent to reinstatement under the writ. But this cannot be accomplished in this proceeding, since the executive and administra-

tive action of the President cannot be controlled by mandamus. In Marbury vs. Madison, 1 Cranch, 137, it was held that the writ of mandamus may issue against the heads of departments to compel the performance of a purely ministerial act, not involving judgment or discretion; but this case has been generally construed as holding that courts have no jurisdiction to compel the President by mandamus to perform even a purely ministerial act incidental to his office.

In Mississippi vs. Johnson, 4 Wall., 475, where the State of Mississippi sought by injunction to restrain President Johnson from the execution of the Reconstruction Acts of Congress, upon the ground that they were unconstitutional, the court clearly declared that it was without jurisdiction either to compel the execution of a constitutional law by the President, or to restrain him from executing unconstitutional legislation. The reason for the refusal of the court to exercise the power was stated in the opinion as follows: "Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment?' Would the strange spectacle be offered to the Public world of an attempt by this court to arrest proceedings in that court?"

76 Since, therefore, we are without jurisdiction to compel the vacation of the order of dismissal from the service, the reinstatement of relator cannot be accomplished in this proceeding. Of course, if it is apparent that injustice has been done, the power lies with the President, upon the petition of the relator, to vacate the order and direct a rehearing by the final classification board. The courts, however, are powerless to compel such action.

The judgment is reversed with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

77 January Term, 1922.

Tuesday, January 3rd, A. D., 1922.

* * * * * * *

No. 3693.

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione WILLIAM F. CREARY.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby reversed with costs, and that this cause be and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this court.

Per MR. JUSTICE VAN ORSDEL.
January 3, 1922.

78 In the Court of Appeals of the District of Columbia.

No. 3693.

No. 21, Special Calendar.

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

UNITED STATES OF AMERICA ex Relatione WILLIAM F. CREARY, Appellee.

Motion for Writ of Error.

Now comes the Appellee in the above-entitled cause and prays the Court for a writ of error to remove the same to the Supreme Court of the United States; to stay mandate; and to fix a nominal bond to act as a supersedeas; and for cause shows:

1. That writ of error lies under paragraph 3 of Section 250 of the Judicial Code in that the Appellee, in being deprived of his office as an officer of the Army of the United States, was denied due process of law guaranteed to him by the Constitution of the United States.

2. That writ of error lies under paragraph 5 of Section 250 of the Judicial Code in that the existence of the authority of the President of the United States to delegate to the Secretary of War the power

(*a*) to approve the action of the Final Classification Board

(*b*) to approve the action of the Board of Officers

(*c*) to discharge the Appellee from the Army of the United States under the purported authority of Section 24*b* of the Act of June 4, 1920, known as the Army Reorganization Act,

is drawn in question.

3. That writ of error lies under paragraph 5 of Section 250 of the Judicial Code in that the existence of the authority or power of the Secretary of War

(*a*) to approve the finding of the Final Classification Board

(*b*) to approve the finding of the Board of Officers

(*c*) to discharge the Appellee from the Army of the United States

is drawn in question.

79 4. That writ of error lies under paragraph 5 of Section 250 of the Judicial Code in that the exercise of the power of the Secretary of War to discharge the Appellee from the Army of the United States without a hearing before the Board of Officers is drawn in question.

5. That writ of error lies under paragraph 6 of Section 250 of the Judicial Code for that the construction of Section 24*b* of the Act of June 4, 1920, known as the Army Reorganization Act, is drawn in question by the respondent who relies upon said Act as authority for the approval of the action of the Final Classification Board, the Board of Officers, and as authority for his right to discharge the Appellee from the Army of the United States.

Respectfully submitted,

SAMUEL T. ANSELL,
EDWARD S. BAILEY,
CHARLES POPE CALDWELL,
Attorneys for the Appellee, William F. Creary.

Service of copy of the above received today.
PEYTON GORDON,
U. S. Attorney.
Jan. 16/22.

(Endorsed:) No. 3693. John W. Weeks, Secretary of War, Appellant, vs. United States of America ex rel. William F. Creary. Motion for writ of error. Court of Appeals, District of Columbia. Filed Jan. 16, 1922. Henry W. Hodges, Clerk.

80 Friday, January 20th, A. D. 1922.

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No. 3693.

JOHN W. WEEKS, Secretary of War, Appellant,

vs.

THE UNITED STATES OF AMERICA ex Relatione WILLIAM F. CREARY.

On consideration of the motion for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United States and to stay the mandate until further order, It is ordered by the Court that said motion be and the same is hereby granted, and the bond to act as supersedeas is fixed at the sum of three hundred dollars.

81 In the Court of Appeals of the District of Columbia.

No. 3693.

JOHN W. WEEKS, Secretary of War, Appellant,

v.

UNITED STATES OF AMERICA ex Relatione WILLIAM F. CREARY, Appellee.

Assignments of Error.

William F. Creary, the appellee herein and plaintiff in error, hereby assigns error in the final order or judgment of the Court of Appeals of the District of Columbia entered on the 3d day of January, 1922, in the following particulars:

1. The Court of Appeals of the District of Columbia erred in holding that the Secretary of War had the power to review and approve the action of the Final Classification Board, the action of the Board of Officers and to discharge William F. Creary from the Army of the United States.

2. The Court of Appeals erred in holding that the Secretary of War had the power to discharge William F. Creary from the Army of the United States without notice and the opportunity being given him to appear and be heard before the Board of Officers convened to determine the cause of his classification, as provided by the Act of June 4, 1920, 41 Stat. L. 759, 773.

3. The Court of Appeals erred in holding that the President had the power to delegate to the Secretary of War the authority to review and approve the action of the Final Classification Board, the action of the Board of Officers and to discharge William F. Creary from the Army of the United States.

82 4. The Court of Appeals erred in holding that the duty required of the President by the said Act of June 4, 1920, to review the action of the Final Classification Board and the Board of Officers, and his power to discharge an officer from the Army of the United States under said act, are administrative and not judicial, and can be delegated.

5. The Court of Appeals erred in holding that the duty required by said Act of June 4, 1920, to review the action of the Final Classification Board and the Board of Officers and the power given by said act to discharge an officer from the Army, need not be exercised personally by the President.

6. The Court of Appeals erred in holding that it was without jurisdiction to compel the Secretary of War to vacate the order made by the Secretary of War discharging William F. Creary from the Army and to restore him to his office as colonel in the Army of the United States from which he had been discharged.

SAMUEL T. ANSELL,
EDWARD S. BAILEY,
Attorneys for William F. Creary.

83 [Endorsed:] In the Court of Appeals of the District of Columbia. No. 3693. John W. Weeks, Secretary of War, Appellant, vs. United States of America, ex rel. William F. Creary, Appellee. Assignments of Error. Court of Appeals, District of Columbia. Filed Jan. 26, 1922. Henry W. Hodges, clerk. Ansell & Bailey, Attorneys at Law, Albee Building, Washington, D. C.

84 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between John W. Weeks, Secretary of War, Appellant and The United States of America, ex relatione William F. Creary, Appellee, a manifest error hath happened, to the great damage of the said Appellee, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Suprme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 26th day of January, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal of Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Allowed by

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85 (*Bond on Writ of Error.*)

Know all men by these presents, that we, William F. Creary, as principal, and United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto John W. Weeks, Secretary of War in the full and just sum of Three Hundred ($300.00) Dollars to be paid to the said John W. Weeks, Secretary of War, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 26th day of January in the year of our Lord one thousand nine hundred and twenty-two. Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between John W. Weeks, Secretary of War, Appellant, and United States of America, ex relatione William F. Creary, Appellee, #3693 a judgment was rendered against the said William F. Creary on the third day of January, nineteen hundred and twenty-two, and the said William F. Creary having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and citation directed to the said John W. Weeks, Secretary of War citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said William F. Creary shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM F. CREARY, [SEAL.]
By EDWARD S. BAILEY, [SEAL.]
His Attorney.

[Seal of U. S. Fidelity & Guaranty Co.]

UNITED STATES FIDELITY & GUARANTY CO., [SEAL.]
By LEE B. MOSHER, [SEAL.]
Attorney in Fact.

Sealed and delivered in the presence of:
K. M. WATERS.
L. R. SAUR.
K. M. WATERS.
L. R. SAUR.

Approved by:
CONSTANTINE J. SMYTH,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 3693. John W. Weeks, Secretary of War, Appellant, vs. U. S. ex rel., William F. Creary. Supersedeas Bond on Writ of Error. Court of Appeals, District of Columbia. Filed Jan. 26, 1922. Henry W. Hodges, clerk.

86 UNITED STATES OF AMERICA, *ss:*

To John W. Weeks, Secretary of War, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein The United States of America, ex relatione, William F. Creary is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Constantine J. Smyth, Chief Justice of the Court of Appeals of the District of Columbia, this 26th day of January, in the year of our Lord one thousand nine hundred and twenty-two.

CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged.
PEYTON GORDON,
United States Attorney,
Counsel for Secretary of War.

Jan. 26, 1922.

87 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 86 inclusive constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of John W. Weeks, Secretary of War, appellant, vs. The United States of America, ex relatione William F. Creary,

No. 3693, January Term, 1922, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 27th day of january, A. D. 1922.

[Seal of Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 28,680. District of Columbia Court of Appeals. Term No. 725. The United States of America *ex relatione* William F. Creary, plaintiff in error, vs. John W. Weeks, Secretary of War. Filed January 30th, 1922. File No. 28,680.